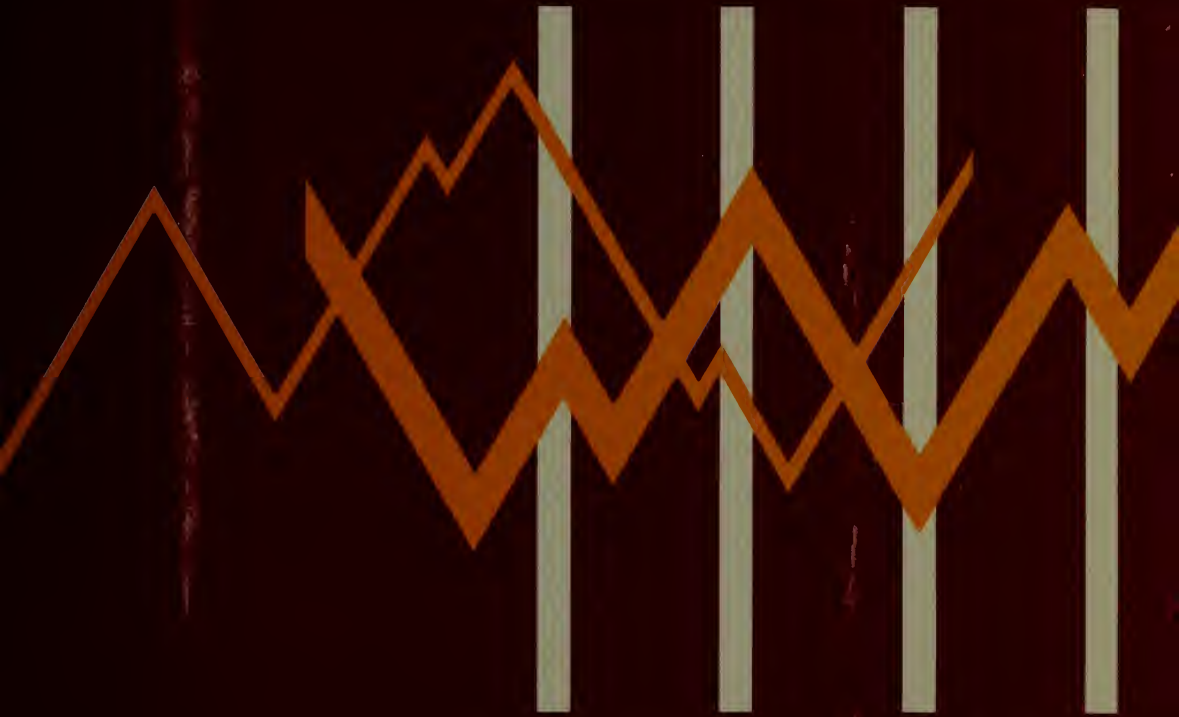




Law Reform Commission
of Canada

Commission de réforme du droit
du Canada

Studies on imprisonment



John Barnes

STUDIES
ON
IMPRISONMENT

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Notice

This book contains two sections. The first consists of four research papers prepared for the Law Reform Commission of Canada. These papers focus on specific issues concerning imprisonment.

The second section consists of a Working Paper of the Law Reform Commission of Canada. This includes the philosophy of the Commission and recommendations for changes in the law. The proposals in this section represent the views of the Commission.

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Table of Contents

	Page
Preface	1
PART I	
The September Study: A look at sentencing and recidivism	5
Release Measures in Canada	79
Legal Controls for the Dangerous Offenders	153
Dangerous Sexual Offenders in Canada	247
PART II	
Imprisonment and Release—A Commission Working Paper	Coloured Section

Preface

Discussing imprisonment is very much like discussing war. One can be against it in general but in favour of it in specific cases. Unfortunately, the specific cases make up to the general picture.

There are very few people and arguments left today that seriously find in prisons (as in war) a general good. This, we have to remind ourselves, is a relatively new situation since traditionally imprisonment has been justified by good intentions: piety (penitentiary), industry (work houses), reform (reformatories) and rehabilitation (correctional institutions). Bad consequences, perceived from the beginning, were usually regarded as failures of prison management which subsequent reform could cure, rather than as indigenous to the system itself.

There are now very few illusions left. What is left, however, is the problem of what to do with people who are a serious threat to those around them, what to do with our own feelings about people who flagrantly break the social trust we live by and what to do when people resist reasonable demands made on their responsibility for harmful actions.

There is still a general illusion pervading public discussion that imprisonment solves these problems. This illusion can be seen as a carry-over from the forerunners of imprisonment: capital punishment and deportation. These indeed did settle the practical problems and one did not have to face them again. It is therefore perhaps understandable that the demand for capital punishment (and even deportation) arises again and again when the illusion that prisons solve problems breaks down. The general answer to the demand for capital punishment bears this out: it usually consists in a shoring up of the prison ideology by mandatory sentences of long durations and the elimination of release provisions.

The Commission Working Paper on Imprisonment does not solve these dilemmas nor does it propose radical solutions. It does, however, attempt to give a sober account of the situation and provides a rational

framework for accepting necessities as we see them today. Our perception of what is necessary is shaped by historical, ideological and socio-political factors which are the real constraints within which a commission has to operate.

It will be easily recognized by those who have given any thought to prisons at all that the need to banish people from our midst is contained in our concept of separation; that the need to give expression to community feelings is reflected by our concept of denunciation and that we have also made provision for the use of prison as a last resort. What is more difficult to grasp in the working paper is that the proposals contained in the paper are changing the very concept of imprisonment itself. This is best exemplified by our proposals for release procedures where the argument shifts from imprisonment and release as absolute categories to a continuum of degrees of deprivation of liberty. Deprivation of liberty after all is the basic action (stone walls do not a prison make) as liberty for everyone must be the basic equation of the criminal law itself.

Clarifying basic issues, however, must not obscure the need for specific information. All our working papers are based on a great deal of study and consultation. It is impossible to publish, or even to commit to writing all that comes to bear on a working paper. The selection made for this background volume thus deals only with specific problem areas.

In looking at specific issues the first obstacle one meets is the deplorable absence of data. It cannot be said strongly enough that the basic accounting of what we do in the criminal justice process is clearly irresponsible and would not be tolerated in any other area. We will have more to say about this in a forthcoming volume on empirical studies. It has to be said here however that law reform, once it addresses itself to the actual consequences of legal prescriptions and decisions, finds itself at the present time in a virtual vacuum of reliable data. The "September Study" which we present here is a single-handed effort with the assistance of the R.C.M.P. to produce at least some rough ratios of decisions and their consequences. No doubt, it will be questioned; it does not bear out many popular assumptions. And it should be questioned, hopefully in such a way which will raise the larger question: why is it that although individual cases are accountable through the canons of the law, there is no overall accountability for cumulative effects? And clearly, policy cannot be based on the former but only on the latter. It is no surprise that public opinion rests on isolated cases and that legislators are in a similar position when they have to make decisions.

We have omitted a general paper on imprisonment in this volume but felt that we should present materials on release since we make major recommendations in this area. There is also a further study in process examining the administrative law aspects of decision making by the parole

board. The second volume of *Studies in Imprisonment* also contains a study by Peter Macnaughton-Smith "*The Decision to be Slightly free*" which seriously questions a number of assumptions concerning the effects of parole. Sending people to prison is a fairly simple matter. Knowing what to do once they are there is infinitely more difficult and enabling them to live in society after that experience is highly problematic.

Finally, we present two studies on the subject of dangerous offenders, one by R. R. Price and A. D. Gold, the other by C. Greenland. It is well recognized in several studies, proposals, as well as legislative provisions that it is a relatively small number of dangerous cases which form public opinion on crime and prisons and that they should be treated in a special way. Although the logic of this proposition is sound, an examination of the history of special legislation for dangerous offenders shows that decisions made on the basis of categorical predictions are not sound and these forms of legislation have been largely a failure. This has led the Commission to conclude that, although seriousness of the offence and behaviour of the offender are obviously the basis for the decision to use imprisonment, there is no way by which special categories could be pre-selected. Only the future can show the person's ongoing behaviour and this should determine the kind of constraints we need to place on him.

Unease about prisons will no doubt continue. A great deal depends on the implementation and success of other sentencing measures which were proposed in our working papers on Principles of Sentencing and Disposition, on Restitution and Compensation, on Fines and on Diversion. Even then, unease about prisons should continue and should force us to justify this measure whenever we are impelled to use it.

The September Study A Look at Sentencing and Recidivism

A Study Paper
prepared for the
Law Reform Commission of Canada

by

Kathryn Barnard
Carol Tennenhouse
and
Mark Krasnick

Contents

	Page
Foreword	9
1. INTRODUCTION	
Male or Female?	12
How Old?	12
Where Were they Convicted?	12
What Types of Offences Did they Commit?	12
What Types of Sanctions Did they Receive?	13
Was There Something Unusual about September, 1967? ..	13
2. THE RESULTS	
<i>Property Offenders</i>	
Imprisonment, Fine, Probation, or Suspended Sen-	
tence?	18
Imprisonment—For How Long?	18
How Expensive Were These Fines?	18
What if this Wasn't a First Indictable Offence?	18
Who Returned?	19
How Many of the First-Time Property Offenders	
Returned to the Criminal Courts?	19
What Types of Subsequent Offences?	20
Third-Time Offenders	20
Was the Recidivism Rate Related to the Type of	
Sanction Imposed?	20
A Word of Caution	
<i>Crimes Against Persons</i>	
Sanctions for Offenders Against Persons	22
	7

Length of Imprisonment Terms	22
Fines—How Much?	23
Type of Sanction Received by “Experienced” Offenders	23
Recidivists	24
The Results	24
Property, Person, Sexual or Other?	24
Was the Recidivism Rate Related to the Type of Sanction Imposed?	24

Sex Offenders

What Crimes did They Commit?	25
What Disposition?	25
Days, Months or Years?	25
Fines	26
The ‘Experienced’ Offender	26
The Recidivists	26

3. THE COMPLETE(D) PICTURE

References	47
Appendix I – Imprisonment	49
– References	51
Appendix II – Some Further Facts	53
A. Ages of the Offenders	53
B. Variations in Sanctions	53
C. The Experienced Offender	54
D. Further Notes on Recidivism ...	54
Appendix III – Five years later	69
A. Property Offenders	69
B. Offenders Against the Person ...	70
C. Sexual Offenders	71
D. General Use of Sanctions	71
Appendix IV – A Short Note on Our Method	77

Foreword

This study began in response to a number of requests to provide some base data on sentencing and recidivism. It was never the intention of this Commission to attempt a definitive study—instead our request was more modest. We asked just two basic questions:

1. How frequently are the various sentencing options used?
2. How many first offenders can we expect to see in the courts again?

At the time our Sentencing Project started, there was no national data on sentencing and recidivism. Hopefully this study will play just a small part in enabling the appropriate agencies to gather, correlate and then provide answers to these very basic questions about sentencing and about offenders. As a Commission, we believe that actions by governments and officials should be evaluated. Without appropriate information, proposals for change and reform lack the empirical grounding that would make them effective.

1. Introduction

Since biblical times society has been forced to deal with those who commit serious crimes: should they be punished or given another chance? If punished, how? Will this affect the likelihood of their committing further crimes? Unfortunately, there are no simple or definitive answers to these questions. We hope, however, that by looking at the actual experiences of these offenders we will come a step closer to some of the answers.

Because it would have been impossible to trace the experiences of all of Canada's offenders, we focused on a smaller group. And, as the Commission was particularly interested in serious Criminal Code convictions, we chose as our "population" those offenders convicted of their first indictable Criminal Code offence (excluding motor vehicle offences) in September, 1967. They numbered 2,071. We then traced the criminal careers of each over a five-year period* which enabled us to answer our two central questions:

1. How frequently are the various sentencing options used?
2. How many first offenders can we expect to see in the courts again?

Besides noting the original sanction given these offenders and their later involvement in the Criminal Justice System, we tried to find out a little more about them: What was their sex? How old were they? Where did they come from? What were they convicted of? What types of sanctions did they receive? With this information, we can now briefly introduce these offenders before discussing our two central questions.

* We also included 33 cases containing information about criminal convictions in the sixth year.

Male or Female?

Barbara Wootton once said, "From the crude criminal statistics, the most striking and consistent answers that suggest themselves are that crime is the product of youth and masculinity".¹ Very few women embarked on criminal careers in September, 1967. The vast majority of those convicted then of their first indictable Criminal Code offence were men. *See Table 1, page 14.* lows:

*How Old?**

Again, Baroness Wootton's observation seems strikingly accurate: crime is the "product of youth". Over one-quarter of our offenders were under nineteen and almost three-quarters were under thirty.

See Table 2, page 14.

* See also Appendix IIA.

Where Were they Convicted?

Not surprisingly, Ontario and Quebec had by far the most productive court systems in Canada. Over half of all the convictions were made in these two provinces. Judges in British Columbia and the Maritimes combined convicted just over one-fifth of the offenders while the prairies were responsible for just under one-fifth. Very few were convicted in the Yukon or Northwest Territories.

See Table 3, page 14.

What Types of Offences Did they Commit?

The majority of offenders committed property crimes, i.e., acts involving other peoples' property. These offences ranged from a simple break and enter to a sophisticated "white-collar" fraud. One in every seven offenders committed an offence against another person while only one in 20 was convicted of a sexual offence.

See Table 4, page 15.

What Types of Sanctions Did they Receive?

In its Working Papers on sentencing, the Law Reform Commission has stressed the social and economic benefits resulting from the use of fines. How often was this sanction used? In our study, less than five per cent of the time. Of course, this doesn't mean that the other ninety-five per cent of the offenders were imprisoned. In fact, over forty per cent were put on probation, given a suspended sentence, or released on bond. However, more than twenty per cent were deprived of their freedom.

See Table 5, page 15.

Was there Something Unusual about September, 1967?

We must consider one more question before examining the results of our study: if we had chosen for our "population" those convicted in any other month of 1967, would our results have been very different? To answer this question, we compared our results with the data collected by Statistics Canada on all those convicted of indictable offences in 1967. There were only minor differences between these two populations.

See Table 6, page 16.

TABLE 1: Sex of Offenders

Sex	Number	Per cent
Men	1,760	85%
Women	311	15%
TOTAL	2,071	100%

TABLE 2: Age of Offenders

Age	Number	Per cent
18 or less	592	28.6%
19-21	512	24.7%
22-29	429	20.7%
30 or more	538	26.0%
TOTAL	2,071	100.0%

TABLE 3: Province of Conviction

Province	Number	Per cent
Ontario	748	36.1
Quebec	512	24.7
British Columbia	224	10.8
Maritimes	209	10.1
Saskatchewan and Alberta	189	9.1
Manitoba	180	8.7
Yukon and Northwest Territories	9	.5
TOTAL	2,071	100.0

TABLE 4: Type of Offence Committed

Type of Offence*	Number	Per cent
Property Offences	1,412	68.2%
Offences Against the Person	287	13.8%
Sex Offences	111	5.4%
Other Criminal Code Offences	261	12.6%
TOTAL	2,071	100.0%

* See pages 17, 20 and 23 for the offences committed. In the case of multiple offences, only the most serious was considered.

TABLE 5: Sanction Received

Sanction*	Number	Per cent
Fine	80	3.9%
Fine or days in default	650	31.4%
Probation, suspended sentence, bond	880	42.5%
Imprisoned for one day only	121	5.8%
Definite and indefinite terms	27	1.3%
Imprisonment for more than one day	313	15.1%
TOTAL	2,071	100.0%

* These statistics are for primary sentences only. In addition to these sanctions, an offender may have been ordered to provide restitution for his/her victim, or meet other requirements set down by the Court.

TABLE 6: Comparison* between September Study Population and all those Convicted of an Indictable Criminal Code Offence in 1967.²

<i>A. Sex of Offenders</i>			
	September Study	1967 Convictions	Difference
Male	85%	87.4%	2.4%
Female	15%	12.6%	2.4%
<i>B. Age at Time of Conviction</i>			
	September Study	1967 Convictions	Difference
Under 20	28.6%	35.7%	7.1%
20-24	24.7%	23.4%	1.3%
25-29	20.7%	12.1%	8.6%
30 or Over	26.0%	28.8%	2.8%
<i>C. Province of Conviction</i>			
	September Study	1967 Convictions	Difference
Ontario	36.1%	35.2%	0.9%
Quebec	24.7%	20.1%	4.6%
British Columbia	10.8%	15.3%	4.5%
Sask. and Alta.	9.1%	15.2%	6.1%
Manitoba	8.7%	5.9%	2.8%
Maritimes	10.1%	7.8%	2.3%
Yukon and NWT	0.5%	.5%	—

* These statistics may not be directly comparable: many offenders who committed other indictable Criminal Code offences prior to 1967 are included in the Statistics Canada figures.

The Results

In order to discuss the results of our study, we have divided our offenders into three* distinct groups: those first convicted of a property offence, those first convicted of an offence against a person, and, those first convicted of a sexual offence. By focusing on the experiences of each of these groups separately, we hope to obtain a deeper appreciation of both the use and the success of the various sanctioning alternatives.

PROPERTY OFFENDERS

Almost two-thirds of our offenders were first convicted as property offenders, their offences having involved property belonging to others. These offenders had committed the indictable Criminal Code offences of:

Offence	No. of offenders
theft of a motor vehicle	67
theft over \$50	130
theft under \$50	585
break and enter	293
possession of stolen goods	121
fraud or false pretences	120
malicious damage	68
attempted theft	24
attempted fraud	4
	<hr/> 1,412

As can be seen, violence or even the threat of violence is absent from almost all of these offences. In fact, these crimes have often been referred

* The experiences of those who were convicted of “other indictable criminal code offences” in September, 1967 were not examined closely. We felt that because of the wide range of crimes which fell within this category there would be little point in undertaking this analysis.

to as "non-violent" property offences. But, before we can adopt this classification we must make one qualification. By definition, the offences of malicious damage and breaking and entering *may* result in situations potentially dangerous to others. We do not know exactly how many of these offences resulted in the creation of this type of danger. We assume that they were few. With this qualification in mind, we can now examine the sanctions given our non-violent property offenders.

Imprisonment, Fine, Probation, or Suspended Sentence?

Figure 1, page 27, reveals a fascinating—though somewhat depressing—sentencing distribution. Given that the overwhelming majority of these crimes were non-violent offences, the rate of imprisonment of these *first-time* offenders seems quite high: one offender in five was imprisoned for at least one day.

Imprisonment—For How Long?

The majority of those imprisoned were sentenced to terms of one month or less, including 96 offenders (31.4% of those imprisoned) who were sentenced to only one day. However, at least one first-time non-violent property offender in six was sentenced to more than six months imprisonment.

See Table 7, page 28.

As shown in Figure 1, page 27, many novice property offenders received sanctions other than imprisonment. Over half of these offenders were given a suspended sentence or were put on probation. Just over a quarter were ordered to pay a fine.

How Expensive Were these Fines?

The amounts of these fines raise some interesting questions. Almost seventy per cent of the fines were for \$50 or less while fewer than two per cent were for more than \$150. Why was the frequency distribution of the amounts of fines so skewed? Were fines being used as effectively as they might be?

See Chart 1, page 29.

What if this Wasn't a First Indictable Offence?

So far we have been concerned with the types of sanctions our offenders received following their first conviction in September, 1967. Un-

fortunately many of these offenders did not limit their participation in the criminal justice system to this one offence. In fact, some were convicted of as many as four other indictable offences during the next five years. Did the types of sanctions given these offenders on their subsequent convictions seem to vary according to the number of previous offences they had committed (since September, 1967)?

In his study concerning the sentencing practices of Ontario magistrates, John Hogarth found that at least one-quarter of the magistrates surveyed, "would automatically presume in favour of imprisonment if the offender had a previous criminal record."³ Our findings seem to reflect this tendency. As can be seen in the following table, a non-violent property offender convicted of one previous indictable offence had a higher probability of receiving a more drastic sentence than did a first-time offender convicted of a non-violent property offence: the chances of being imprisoned for more than one day *trebled* while the probability of being put on probation or receiving a suspended sentence *fell* by almost a half.

This increase in severity was also encountered by third-time offenders. More than half of these people were imprisoned while only one-fifth were put on probation or given a suspended sentence.

See Table 8, page 30.

There can be little doubt then that the more 'experienced' the offender, the greater the probability of imprisonment. The non-violent property offender who had been convicted of four previous indictable offences only stood a one-in-five chance of *not* being imprisoned.

Who Returned?

One of the main questions to be answered when we undertook this study was, "how many of the first offenders could we expect to see in the courts again?" When we began researching this topic, however, we found several other issues which also warranted investigation: did the returning offender always commit the same type of crime? Was the recidivism rate related to the type of sanction imposed? How long did it take before an offender committed a second crime? Was this time lapse related to the type of sanction imposed? With the information we found, we can now answer at least some of these questions.

How Many of the First-time Property Offenders Returned to the Criminal Courts?

Of the 1,412 novice offenders convicted of non-violent property of-

fences in September, 1967, more than seventy per cent did *not* commit another indictable offence during the next five years. In all, only 386 (just under thirty per cent) of our original non-violent property offenders returned to the criminal courts.

What Types of Subsequent Offences?

Although some of our initial non-violent property offenders were found guilty of committing other types of offences on their second conviction, the majority remained non-violent property offenders. In fact, the chances were almost four to one that a first-time property offender's next conviction would be for a property offence.

Third-time Offenders

Almost two-thirds of the original non-violent property offenders who were convicted of a third indictable offence committed a property crime on their third offence. Over half of these offenders were *third-time property* offenders. This tendency to repeat the same type of crime suggests that even offenders classified as being deeply involved in crime may not proceed to commit the more dangerous offences against persons.

Was the Recidivism Rate Related to the Type of Sanction Imposed?

Probably more hours have been devoted to discussing the relationship (if any) between the type of sanction imposed and the recidivism rate than any other issue in criminology in recent years. Yet, to this day there is unanimous agreement on only one point: the only sanction which guarantees to prevent recidivism 100 per cent of the time is capital punishment. Although this study was not designed to develop new theories on recidivism or sentencing practices, we were able to make some very general observations regarding non-violent property offenders.

Non-violent property offenders who had been imprisoned following their first conviction were more likely to be convicted of a second indictable offence than were those who had received non-custodial sanctions. Forty-four per cent of the offenders who had been imprisoned committed a second indictable offence, while only twenty-eight per cent of those who received non-custodial sanctions were convicted of another indictable offence. The criminal careers of the non-violent property offenders who had

been convicted of two, three or four previous serious Criminal Code offences appear to have followed a similar pattern: those who had been imprisoned had a consistently higher rate of return.

See Chart II, page 31; and Table 9, page 32.

When a time dimension is added, another interesting observation can be made: offenders who had received custodial sentences committed their second indictable offence following a slightly shorter period of time than did those who had received non-custodial sanctions.

See Table 10, page 33.

A Word of Caution

In making our observations, two general qualifications must be kept in mind. First, it must be remembered that the category non-violent property offences includes a wide variety of crimes, the maximum terms of imprisonment ranging from two years to life. Although we can assume that the general sentencing trends noted above were experienced by almost all the property offenders regardless of the particular crimes for which they had been convicted, we can't conclude that the imprisonment rates shown in Tables 7 and 9 for example, were identical for each offence. The imprisonment rate for those convicted of break and enter, for instance, was almost three times the imprisonment rate for those convicted of the less serious offence of theft under \$50.00.

See Table 11, page 33.

Whereas over half of those first imprisoned for break and enter were sentenced to one month or more, less than fifteen per cent of those imprisoned for theft under \$50.00 received this long a sentence.

See Table 12, page 34.

Second, it must be remembered that the types of previous offences committed by each offender vary from case to case. It is quite possible that a person convicted of theft with two previous convictions for manslaughter, for example, would receive a more severe sentence than would a person who, although convicted of the same offence, had already committed two common assaults.

CRIMES AGAINST PERSONS

Since Cain and Abel, we have had to face the problem of how to deal with those who inflict physical injury on others. In our study, almost one out of every seven first offenders belonged to this group of offenders against persons. Their crimes were:

Crime	No. of offenders
manslaughter	1
wounding	5
common assault	127
assault causing bodily harm	83
assault with intent to commit an indictable offence	1
assault of peace officer	34
assault with intent to resist arrest	1
robbery	33
attempted robbery	2
	<hr/> 287

How did our courts react to these offenders?

Sanctions for Offenders Against Persons

It's hardly surprising that several of these offenders received severe sanctions.

Were these sanctions "appropriate"? Of course, this question can't be answered definitely. Given that these offences are usually more threatening to the life and personal security of others than property offences however, we must wonder why the imprisonment rates for these two types of offenders were almost identical.

See Figure 2, page 35.

It's also surprising that almost half of these offenders were ordered to pay a fine while just over one-quarter of the property offenders received this sanction.

Length of Imprisonment Terms

The imprisonment terms given these offenders were slightly more severe than those given property offenders. Still, more than two-thirds of those imprisoned for an offence against a person were sentenced to six

months or less. In fact, not even a fifth of these offenders were given a term of two years or more.

See Table 13, page 36.

Fines—How Much?

As shown in Figure 2, page 35, the most common sanction given was a fine. Although these fines ranged from \$10 to \$500, the majority were for either \$25 or \$50. In fact, more than two-thirds of all fines imposed on these offenders were for \$50 or less.

See Chart III, page 37.

Type of Sanction Received by “Experienced” Offenders

As with property offenders, several of our original 2,071 offenders committed crimes against persons following their first conviction for an indictable offence in September, 1967. Were the types of sanctions given these offenders more severe than those given offenders who were first convicted of a crime against a person?

As can be seen below, a second-time offender faced a very strong possibility of receiving a more severe sanction than his novice counterpart. In fact, at least one second-time offender in three was imprisoned for more than one day whereas only one first-time “personal” offender in five received this sanction.

Third-time offenders faced even more drastic consequences: more than half were imprisoned. The remaining offenders were fined. Generally speaking, fourth and fifth time offenders encountered a similar sentencing pattern although a few of these offenders were either put on probation or given a suspended sentence.

See Table 14, page 38.

As with property offenders, it must be remembered that several different types of crimes are included under the heading offences against persons. It's quite likely that the imprisonment rates for each of these crime-types varied slightly from the overall rates discussed above. In addition, the types of previous offences committed by each offender probably differed from case to case.*

* See Appendix IIB.

Recidivists

Those who commit homicides or assaults do not usually see themselves as being 'real criminals'. For these offenders, *real* crime is "stealing".⁴ And, because the offences committed by these offenders are often the result of "chance" social conflicts and not organized plots by "real" criminals, these people are often characterized as one-time offenders. Did our study support this hypothesis?

The Results

Of the 287 people whose first conviction was for an offence against a person, more than eight offenders in ten did *not* commit a further indictable criminal code offence during the next five years. This relatively low rate of recidivism—less than 20%—is encouraging.

Property, Person, Sexual or Other?

The analysis becomes even more interesting when we examine the activities of those who did commit a second indictable offence. Although almost *thirty per cent* of these second offences were again crimes against persons, more than *forty per cent* were property offences. Only 12% of those who first committed an offence against a person committed a third indictable offence. We therefore did not develop the analysis further.

See Chart IV, page 39.

Was the Recidivism Rate Related to the Type of Sanction Imposed?

We must hedge in answering this question. Although the recidivism rate for novice offenders who had been imprisoned was almost 10% higher than for those who had not been imprisoned, the experiences of the second-time offenders were quite the opposite: while 45.2% of the non-imprisoned offenders were convicted of further crimes, only 40.9% of those who had been imprisoned were returned to the courts.

See Table 15, page 40.

SEX OFFENDERS

Fewer than six per cent of our 2,071 offenders were convicted of a sex offence in September, 1967. Yet the actions of these 111 offenders probably created more public concern than did those of our more than one thousand property offenders combined. Because of the general apprehension and emotional reaction which often accompanies this type of offence, we felt that it would be useful to consider these offenders separately.

What Crimes did they Commit?

These novice offenders were convicted of the indictable offences:

Indictable offence	No. of offenders
rape	8
attempted rape	2
sexual intercourse with female under 14	7
indecent assault on female	37
indecent assault on male	9
other sexual offences	48
	<hr/> 111

What Disposition?

Of the three types of offenders, sex offenders had the highest rate of imprisonment: more than a quarter of these offenders were imprisoned for at least one day. Almost an equal number were put on probation or given a suspended sentence while just over two-fifths were ordered to pay a fine.

See Figure 3, page 41.

Days, Months or Years?

This sentencing distribution appears to be quite similar to the sanctions given those who committed offences against other persons on their first offence. Upon closer examination, however, the similarity all but disappears. Consider, for example, the terms of imprisonment given sex offenders. While more than sixty per cent of the novice offenders who were to be imprisoned for committing a crime against another person received sentences of three months or less, fewer than fifteen per cent of the sex offenders who were to be imprisoned received this short a sentence. In fact,

at least one imprisoned sex offender in three was sentenced to a period of two years or more. Fewer than one out of every eight of those who were to serve time for committing an offence against a person received this severe a sanction on their first offence.

See Table 16, page 42.

Fines

In general, sex offenders received more severe fines than offenders against persons. While almost three-quarters of the fines given personal offenders were for \$75 or less, less than a third of the fines given sex offenders were this small. In fact, chances were more than fifty-fifty that the "fined" sex offender would have to pay at least \$100. In sharp contrast, not one personal offender in four was fined this severely.

See Chart V, page 43.

The "Experienced" Offender

Only fourteen of the original 2,071 offenders were convicted of a sex offence on a subsequent conviction. Because of this small number it is not feasible to compare these sanctions with those given the 111 novice sex offenders.

The Recidivists

The overwhelming majority of our sex offenders had extremely limited criminal careers. Of the 111 novice sexual offenders, no fewer than 96 offenders—87 per cent—failed to commit a further indictable offence during the next five years. Of the fifteen offenders who were convicted of further offences, one-third committed a property offence and an additional third were convicted of a second sexual offence. However, we must also remember that there are some offenders who were imprisoned throughout the time period and were therefore unable to commit a further offence.

See Chart VI, page 44.

Figure 1: Sanctions of Property Offenders on their First Conviction

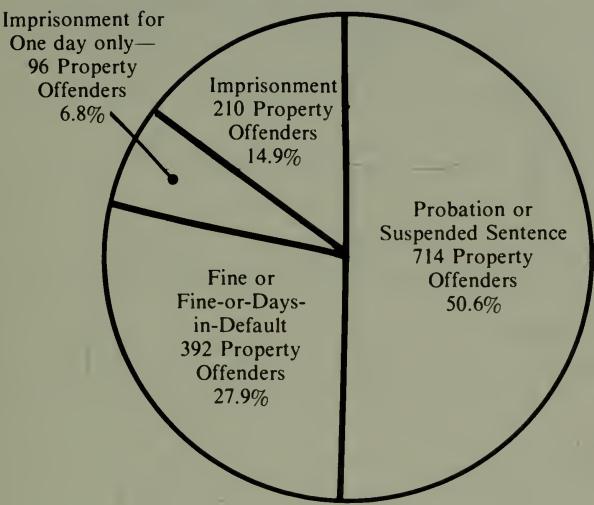
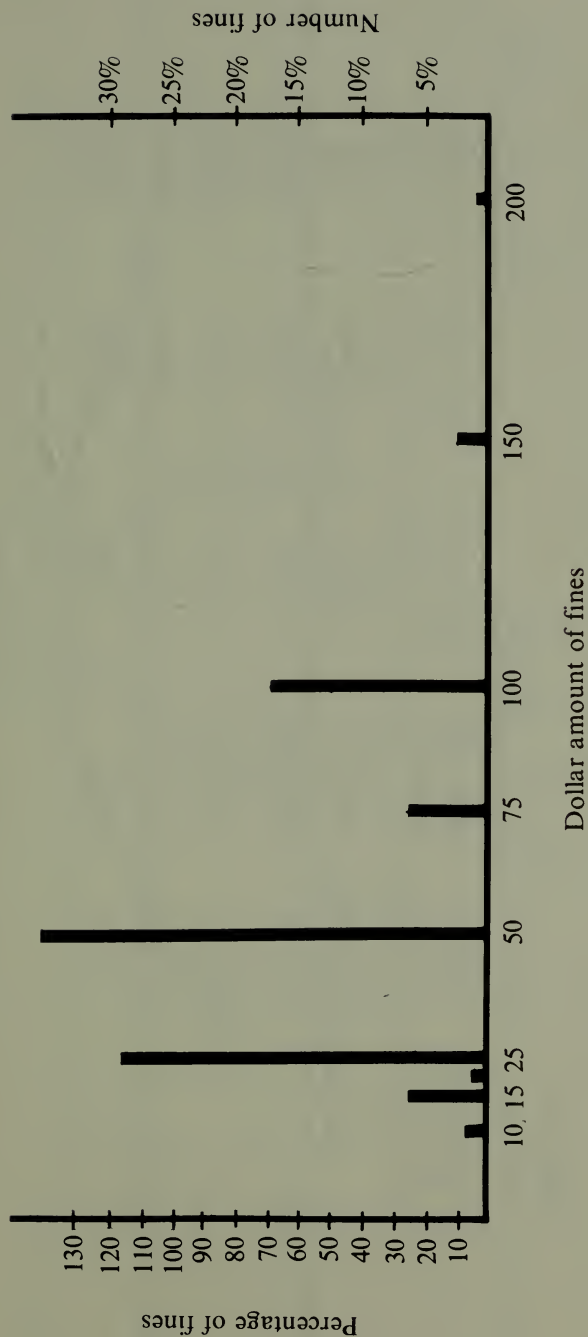


TABLE 7: Imprisonment Terms of Non-Violent Property Offenders on their First Conviction.

Term of imprisonment	Number receiving term	Per cent receiving term	Cumulative per cent
One day	96	31.4	31.4
More than 1 day to 1 month	88	28.8	60.2
More than 1 month to 3 months	38	12.4	72.6
More than 3 months to 6 months	23	7.5	80.1
More than 6 months to less than 2 years	36	11.8	91.9
Indefinite	16	5.2	97.1
2 Years or more	9	2.9	100.0
Total imprisoned	306	100.0	

CHART I: Fines* for Non-violent Property Offenders on their First Conviction



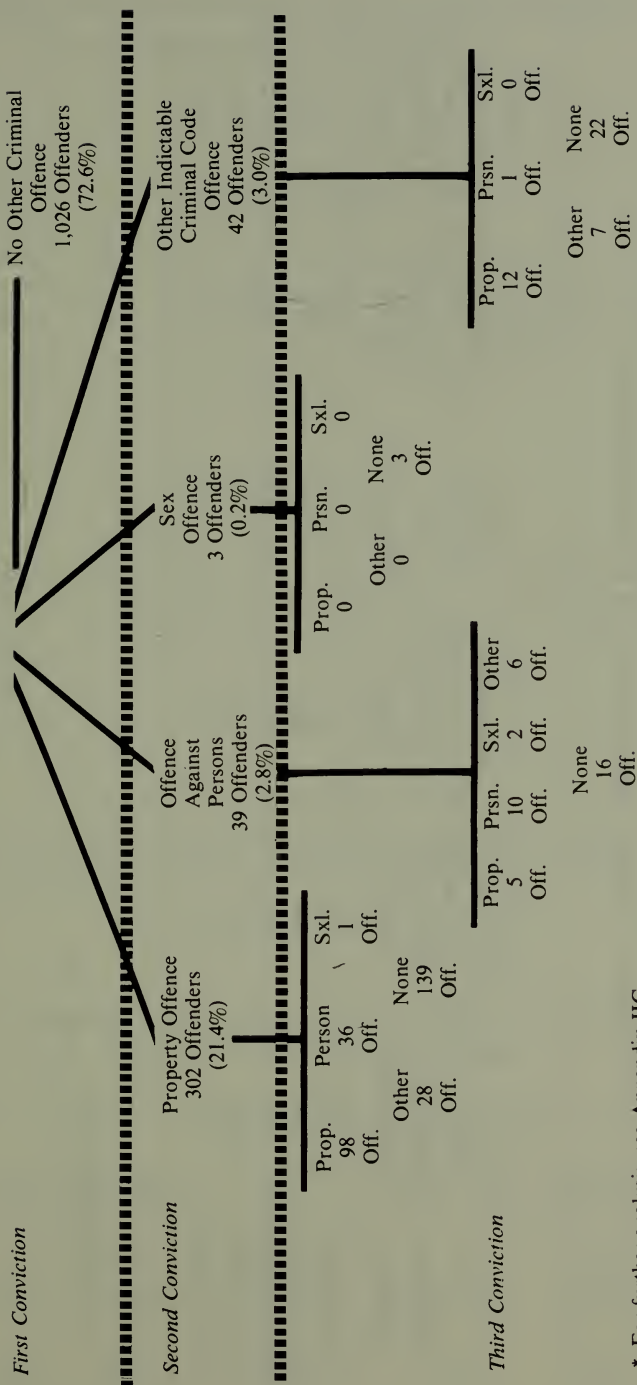
* The dollar values of 14 fines were not known.

TABLE 8: Sanctions of Non-violent Property Offenders by the Number of Previous Convictions Held

Number of previous convictions for indictable offences	Fine or Fine-or-days-in-default	Probation or suspended sentence	Imprisonment for 1 day	Imprisonment for more than 1 day	Total number convicted
0	392 (27.7%)	714 (50.6%)	96 (6.8%)	210 (14.9%)	1,412 (100%)
1	59 (17.0%)	103 (29.7%)	28 (8.1%)	157 (45.2%)	347 (100%)
2	39 (19.2%)	41 (20.2%)	8 (3.9%)	115 (56.7%)	203 (100%)
3	22 (17.5%)	13 (10.3%)	3 (2.4%)	88 (69.8%)	126 (100%)
4	6 (8.7%)	6 (8.7%)	1 (1.4%)	56 (81.2%)	69 (100%)

CHART II: Subsequent Types of Offences Committed by Original Non-violent Property Offenders*

Non-violent Property Offense
1,412 Offenders



* For further analysis, see Appendix IIC.

TABLE 9.: Recidivism of Non-Violent Property Offenders

Conviction number	No. of offenders imprisoned*	No. of those imprisoned who committed a subsequent offence	% of those imprisoned who committed a subsequent offence	No. of offenders not imprisoned*	No. of those not imprisoned who committed a subsequent offence**	% of those not imprisoned who committed a subsequent offence
1st conviction	210	92	43.8	1,202	331	27.5
2nd conviction	157	89	56.7	190	76	40.0
3rd conviction	115	74	64.3	88	38	43.2
4th conviction	88	57	64.8	38	15	39.5
5th conviction	56	35	62.5	13	7	53.8

* For more than one day.

** For further analysis, see Appendix IID.

TABLE 10: Length of Time after Sentence before Second Conviction
(non-violent property offenders)

Imprisoned offenders returning within time period (cumulative percentage of all 210 offenders imprisoned for more than one day)

Length of Time in Months							
3	6	12	24	36	48	60	72
20	25	39	59	72	79	82	85*
9.5	11.9	18.6	28.0	34.3	37.6	39.0	40.5

Non-imprisoned offenders returning within time period (cumulative percentage of all 1,202 non-imprisoned offenders)

44	79	137	199	246	278	296	301*
3.7	6.6	11.4	16.6	20.5	23.1	24.6	25.0

* As the second offences committed by 37 offenders were not indictable offences (although their third convictions were for indictable Criminal Code offences), these offenders were not included in this analysis.

TABLE 11: Sanctions for those Convicted of Break and Enter and Theft under \$50.00 on their First Offence

	Fine	Probation	Imprisonment for 1 day only	Imprisonment for more than 1 day	TOTAL
Break and Enter	9 (3.1%)	207 (70.6%)	12 (4.1%)	65 (22.2%)	293 (100%)
Theft under \$50.00	268 (45.8%)	230 (39.3%)	40 (6.9%)	47 (8.0%)	585 (100%)

TABLE 12: Terms of Imprisonment of those Convicted of Break and Enter and Theft under \$50.00 on their First Offense

	1 Day	1 Day- 1 Mo.- Less than 1 month	3 Mos.- Less than 6 months	6 Mos. Less than 2 Years	Indef. (up to 2 Yrs.)	2 Yrs. or more	TOTAL
Break and	12	22	8	10	21	8	77
Enter	(15.6%)	(28.6%)	(10.4%)	(13.0%)	(27.2%)	(3.9%)	(100%)
Theft under	40	35	5	2	4	0	87
\$50	(46.0%)	(40.2%)	(5.8%)	(2.3%)	(4.6%)	(1.1%)	(100%)

Figure 2: Sanctions of Personal Offenders on their First Conviction

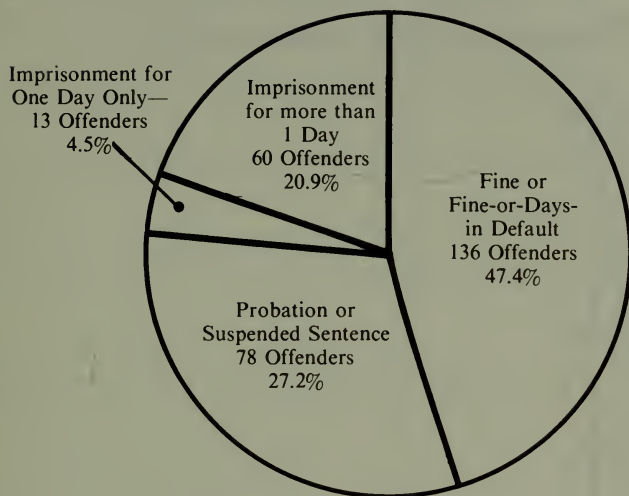
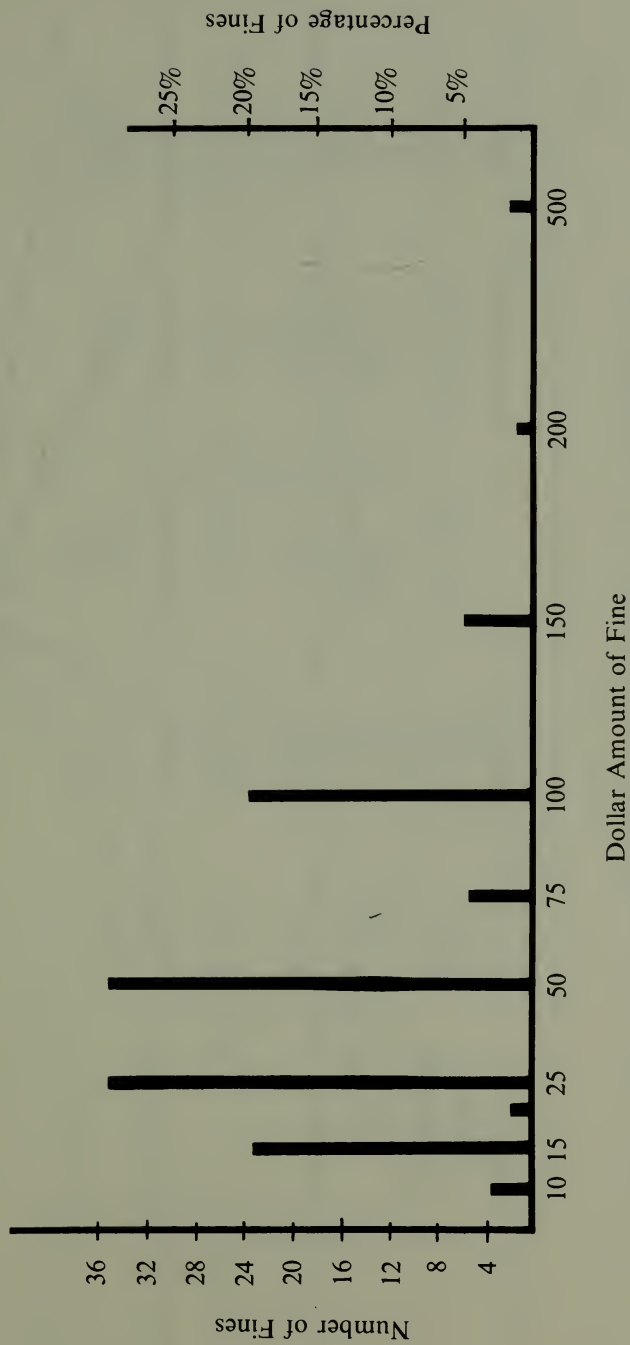


TABLE 13: Imprisonment Terms of Those who Committed Crimes against Persons on their First Conviction.

Term of imprisonment	Number receiving term	Per cent receiving term	Cumulative per cent
One day	13	17.8	17.8
More than 1 day to 1 month	23	31.5	49.3
More than 1 month to 3 months	11	15.1	64.4
More than 3 months to 6 months	7	9.6	74.0
More than 6 months to less than 2 years	6	8.2	82.2
Indefinite	4	5.5	87.7
2 years or more	9	12.3	100.0
Total Imprisonment	73	100.0	

CHART III: Fines* for Offenders who Committed Crimes against Persons on their First Conviction

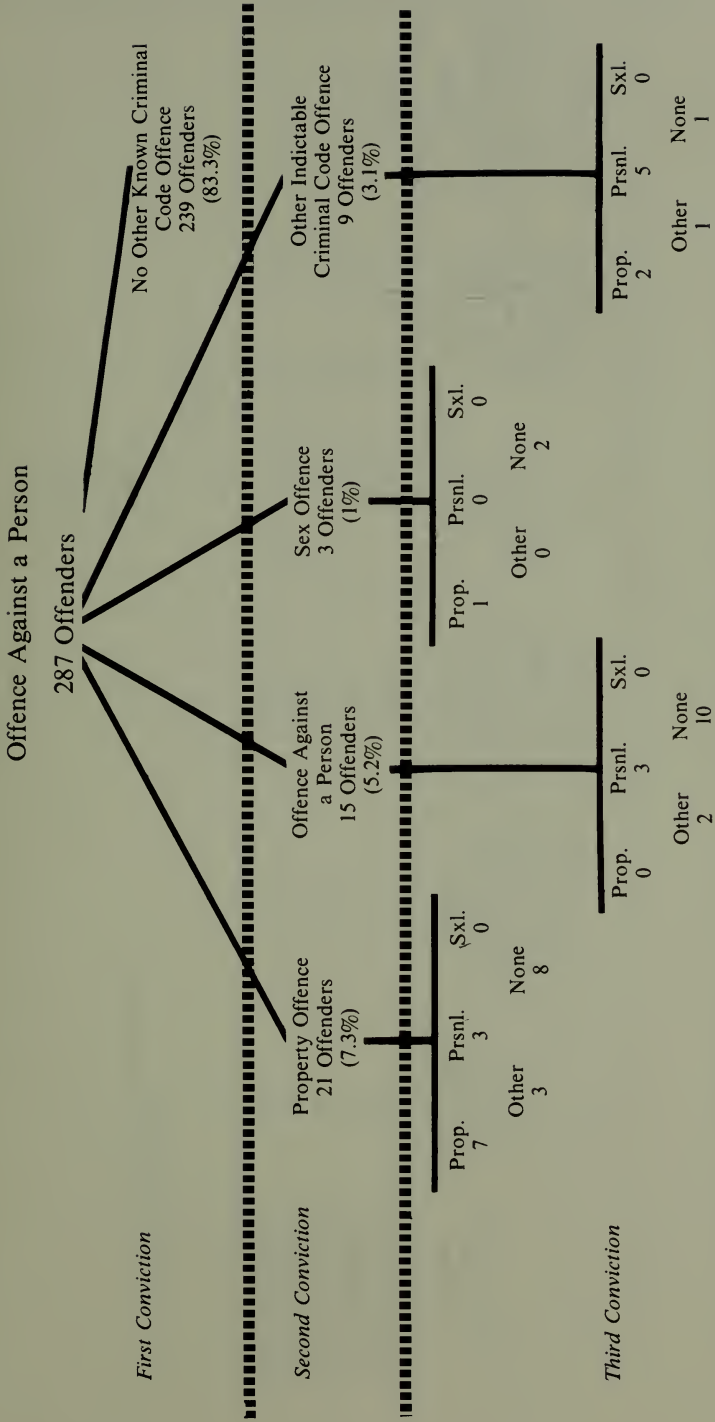


* The dollar value of three fines were not known.

TABLE 14: Sanctions of Offenders who Committed Crimes against
Persons by the Number of Previous Convictions Held

Number of previous convictions	Fine or Fine-or- days-in- default	Probation or suspended sentence	Imprisonment for 1 day	Imprisonment for more than 1 day	Total number convicted
0	136 (47.4%)	78 (27.2%)	13 (4.5%)	60 (20.9%)	287 (100%)
1	32 (50.0%)	9 (14.0%)	1 (1.6%)	22 (34.4%)	64 (100%)
2	17 (41.5%)	0 (0%)	1 (2.4%)	23 (56.1%)	41 (100%)
3	10 (30.3%)	3 (9.1%)	1 (3.0%)	19 (57.6%)	33 (100%)
4	11 (39.3%)	1 (3.6%)	0 (0%)	16 (57.1%)	28 (100%)

CHART IV: Subsequent Types of Offences Committed by Those Who Were First Convicted for an Offence against a Person*



* For further analysis, see Appendix IIC.

TABLE 15: Recidivism of Those who Committed Crimes against Persons

Conviction number	No. of offenders imprisoned*	No. of those imprisoned who committed a subsequent offence	% of those imprisoned who committed a subsequent offence	No. of offenders not imprisoned*	No. of those not imprisoned who committed a subsequent offence**	% of those not imprisoned who committed a subsequent offence
1st conviction	60	17	28.3	227	43	18.9
2nd conviction	22	9	40.9	42	19	45.2
3rd conviction	23	11	47.8			
4th conviction	19	10	52.6			
5th conviction	16	8	50.0			

* For more than one day.

** For further analysis, see Appendix IID.

FIGURE 3: Sanctions of Sex Offenders on their First Conviction.

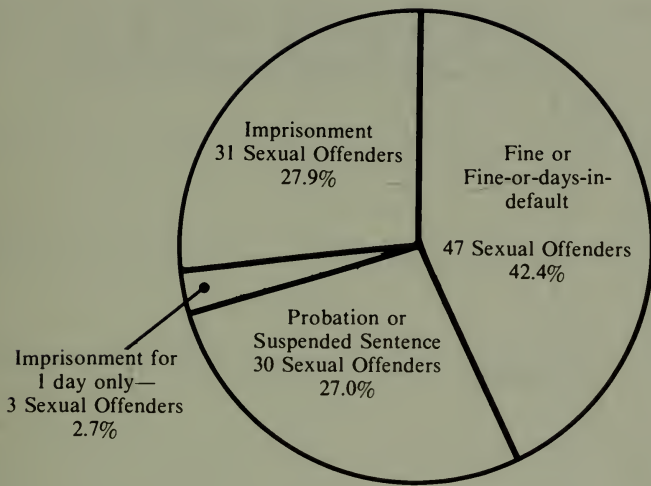
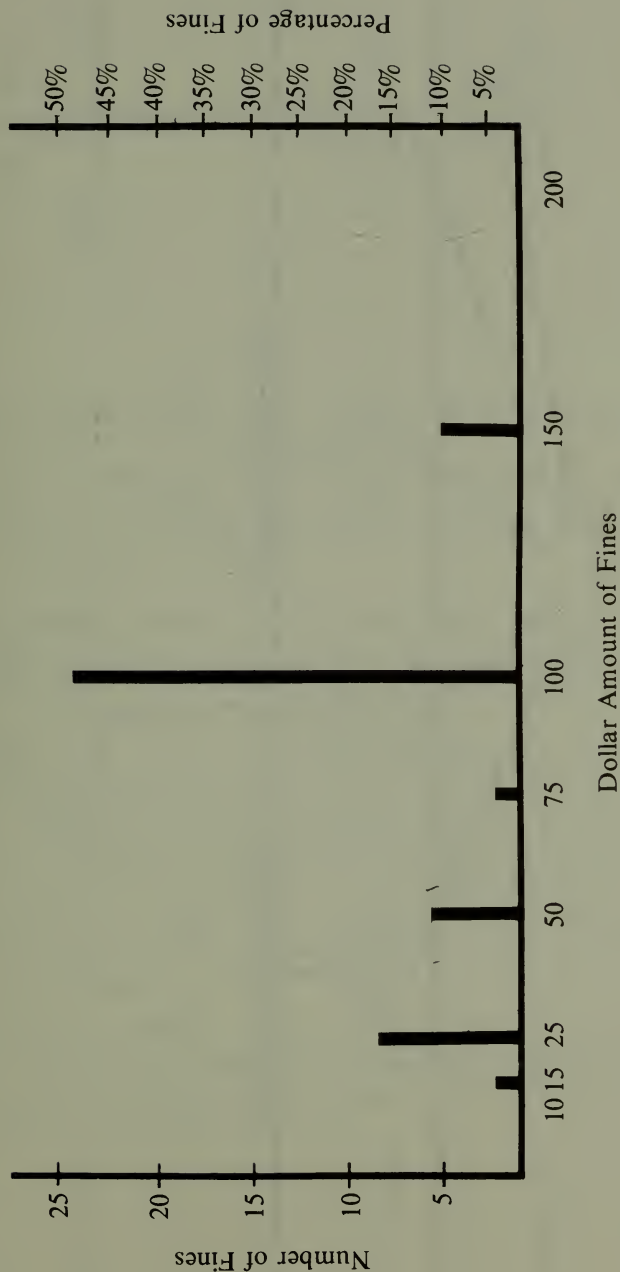


TABLE 16: Imprisonment Terms of Sex Offenders on their First Conviction

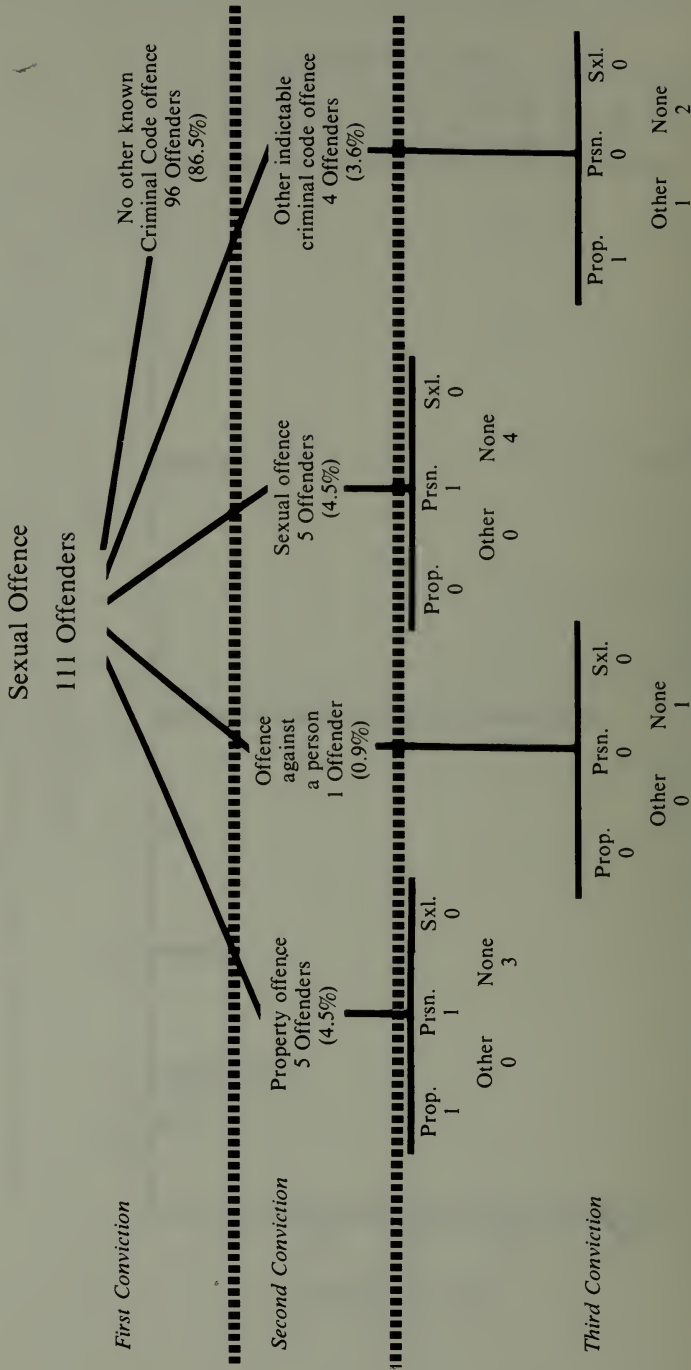
Term of imprisonment	Number receiving term	Per cent receiving term	Cumulative per cent
1 day	3	8.8	8.8
More than 1 day to 1 month	1	2.9	11.7
More than 1 month to 3 months	1	2.9	14.6
More than 3 months to 6 months	8	23.6	38.2
More than 6 months to less than 2 years	6	17.7	55.9
Indefinite	3	8.8	64.7
2 years or more	12	35.3	100.0
Total Imprisonment	34	100.0	

CHART V: Fines* for Sexual Offenders on their First Conviction



* The dollar value of three fines were not known.

CHART VI: Subsequent Types of Offences Committed by Original Sexual Offenders*



* For further analysis, see Appendix IIC.

The Complete(d) Picture

When we undertook this study, we asked two basic questions:

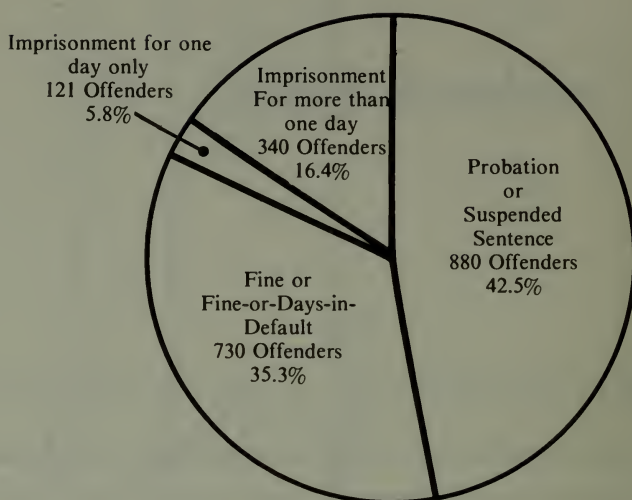
1. How frequently are the various sanctioning options used?
2. How many of the first-time offenders can we expect to see in the courts again?

In answering these questions, we were prompted to raise many more. Some of these have been answered in the course of this study; others will have to await the results of further research. But what of our two original questions?

In the preceding pages, we have tried to provide answers to these two questions by focusing on the experiences of three very different types of offenders—the property offender, the offender against a person, and, the sex offender. Although this approach has been useful in many ways, we must now step back for a moment to view our offenders from a slightly broader perspective: how was *this group* of 2,071 novice offenders sanctioned? How many of the offenders *in this group* were convicted of a second indictable offence?

As can be seen below, the most common disposition granted this group of offenders was a suspended sentence or a probationary term. More than a fifth of the offenders were imprisoned for at least one day while a third were ordered to pay a fine.

FIGURE 4: Sanction of the 2,071 novice offenders.



Finally, how many of these offenders returned? Of the group of 2,071 offenders, at least seven in every ten failed to commit a further indictable offence during the next five years. In all, only 548 offenders (26.5%) were convicted of a second indictable offence.

In conclusion, we wish to raise but one more question, Voltaire once stated, "it is necessity that makes the laws and force that keeps them observed". Was he correct?

References

1. Barbara Wootton, *Crime and The Criminal Law: Reflections of a Magistrate and Social Scientist*, (London: Stevens & Sons, 1963), 5.
2. *Statistics of Criminal and Other Offences, 1967*, Statistics Canada, (Ottawa: Queen's Printer, 1969), 30-35 and 40-43.
3. John Hogarth, *Sentencing as a Human Process*, (Toronto: University of Toronto Press, 1971), 78.
4. M. Clinard and R. Quinney, *Criminal Behaviour Systems: A Typology*, (Holt, Rinehart and Winston, 1967). 22.

Appendix I

IMPRISONMENT

Imprisonment was not a common law punishment.¹ At common law, the task of the judges as commissioners of the general jail was to clear the jails, not to fill them. The punishment for a felony was death and the punishments for lesser crimes included fines, the pillory, dunking, whipping and banishment. Imprisonment was formally introduced into England as a sanction in 1842 when the British Parliament passed legislation permitting offenders to serve their sentence in prisons modelled after the Philadelphia, Pennsylvania system. From this time on, imprisonment was used with increasing frequency. In fact, by 1867 it replaced the established practice of banishing offenders to the colonies.

In Canada, imprisonment as we understand it is also relatively new; it was not until 1837 that the Kingston Penitentiary was built.² Modern day imprisonment was a response to brutal sanctions; but it was also seen as a place of exile—a place where an offender would have the opportunity to contemplate his wrongful deeds and thereby become penitent. The place for silent contemplation, solitary confinement with a bible became the Penitentiary. The benevolent Quakers of Philadelphia introduced the concept; a short time later Dickens was compelled to write:

The system here is rigid, strict, and hopeless solitary confinement. I believe it, in its effects, to be cruel and wrong. In its intentions, I am well convinced that it is kind, humane, and meant for reformation; but I am persuaded that those who devised this system of Prison Discipline, and those benevolent gentlemen who carry it into execution, do not know what they are doing.

. . . I hold this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body; and because its ghastly signs are not so palpable to the eye . . . and it exhorts few cries that human ears can hear; therefore, I the more denounce it, as a secret punishment which slumbering humanity is not roused up to stay.³

Simultaneously, an alternative prison system was being developed in Auburn, New York. It stressed correction and rehabilitation through

work, thus departing from the solitary rule.⁴ It was this model that we adopted in Canada and it still contributes to modern penal philosophy.⁵

In Canada, there are three types of institutions in which offenders may be imprisoned: reformatories, common jails, and penitentiaries. To some degree, the length of sentence imposed by the Court determines the type of institution to which an offender will be sent. In accordance with the provisions of the Criminal Code, an offender who is to be imprisoned for two years or more is sent to a federal penitentiary. If, however, an offender is sentenced to a term of less than two years, he may be committed to a provincial or local jail or a reformatory. In British Columbia and Ontario, an offender may receive both a definite sentence of under two years (i.e., a sentence fixed solely by the court), and an additional indeterminate term which cannot exceed two years less one day. In this situation, the offender would serve the definite term of his sentence in a common jail or reformatory and would then be considered for parole. If parole is granted, the offender would serve the indeterminate portion of his sentence in the community under parole supervision.

REFERENCES—APPENDIX I

1. *Regina v. Turner*, (1975) A. C.
2. Alex J. Edmison, "Some Aspects of Nineteenth-Century Canadian Prisons", in *Crime and Its Treatment in Canada*, ed. W. McGrath (Toronto: Mac-Millan of Canada, 1965), 279-301. See also Riddell, "A Criminal Circuit in Upper Canada: A Century Ago" (1920), 40 *Canadian Law Times*, 711.
3. Charles Dickens, *American Notes and Pictures From Italy*, (New York: Dutton, 1970), 283.
4. Gustave de Beaumont and Alexis de Tocqueville, *On the Penitentiary System in the United States and Its Application in France*, (Illinois: Southern Illinois University Press, 1964), 54-60. See also H. E. Barnes and N. Teeters, *New Horizons in Criminology* (3rd ed. Englewood Cliffs, N. J.: Prentice Hall, 1959).
5. Richard Splane, *Social Welfare in Ontario 1791-1893* Toronto: University of Toronto Press, 1965) 130-148. See also Canada, *Report of the Canadian Committee on Corrections*, (The Ouimet Report) (Ottawa: Queen's Printer, 1969), 186-7.

Canada, Department of Justice, *Report of a Committee Appointed To Inquire Into the Principles and Procedures Followed in the Remission Service of the Department of Justice of Canada* (Ottawa: Queen's Printer, 1956), 11, 46-7, 87-9. See also Canada, *Report of the Royal Commission to Investigate the Penal System of Canada* (Ottawa: Queen's Printer, 1938), 9-11.

Norval Morris, *The Future of Imprisonment* (Chicago: University of Chicago Press, 1974). See also Nigel Walker, *Sentencing in a Rational Society*, (London: Allen Lane, The Penguin Press, 1969); R. Hood and R. Sparks, *Key Issues in Criminology*, (New York: McGraw Hill, 1970); Irvin Waller, *Men Released From Prison* (Toronto: University of Toronto Press. 1974).

Appendix II

SOME FURTHER FACTS

A. Ages of the Offenders

Some recent works in criminology have provided detailed information on the offenders studies including their age, sex, marital status, occupation, and nationality. Unfortunately, this information was not available for our offenders. It was possible, however, to obtain the age of each offender at the time of his/her conviction.

See Tables A1 to A3, pages 55 and 56.

B. Variations in Sanctions

As was discussed in the section on property offenders, each "offence type" includes several different Criminal Code offences. And, although the trends discussed were experienced by the majority of offenders regardless of their particular offence, these rates were not identical for each crime. In the case of property offenders this was demonstrated by comparing the sanctions of those convicted for breaking and entering with those convicted of theft under \$50 on their first offence. Similar variations occurred in the sanctioning of offenders against persons and sexual offenders.

See Tables B1 to B6, pages 56 to 60.

C. The Experienced Offender

As the recidivism charts indicated, many of those convicted of their first indictable Criminal Code offence in September, 1967 were not convicted of a second indictable offence. In order to trace the criminal careers of these offenders, we initially grouped them according to the type of offence first committed and then indicated their subsequent convictions. However, it might also be helpful to first group these offenders according to the types of subsequent convictions each received and then trace their criminal history through to the initial type of offence committed.

See Charts C1 and C2, pages 61 to 65

D. Further Notes on Recidivism

Tables D1 and D2 provide additional information on the recidivism rates of offenders who had received sanctions other than imprisonment. Unfortunately, this information was not available for the sexual offenders.

See Tables D1 and D2, pages 66 and 67.

Table A1 Age of Property Offenders at Time of Conviction

Conviction number	Under 16	16-18 Years	19-21 Years	22-25 Years	26-30 Years	31-45 Years	46 Years and over	TOTAL
First conviction	7 (.5%)	457 (32.4%)	366 (25.9%)	202 (14.3%)	97 (6.9%)	197 (13.9%)	86 (6.1%)	1,412 (100.%)
Second conviction	1 (.3%)	78 (22.5%)	149 (42.9%)	62 (17.9%)	17 (4.9%)	32 (9.2%)	8 (2.3%)	347 (100%)
Third conviction	1 (.5%)	36 (17.7%)	101 (49.8%)	44 (21.7%)	7 (3.4%)	10 (4.9%)	4 (2.0%)	203 (100%)

Table A2 Age of Offenders Against Persons at Time of Conviction

Conviction number	Under 16	16-18 Years	19-21 Years	22-25 Years	26-30 Years	31-45 Years	46 Years and Over	TOTAL
First conviction	0	46 (16.0%)	59 (20.6%)	48 (16.7%)	38 (13.2%)	68 (23.7%)	28 (9.8%)	287 (100%)
Second conviction	1 (1.6%)	8 (12.5%)	17 (26.6%)	23 (35.9%)	5* (7.8%)	6 (9.4%)	4 (6.2%)	64 (100%)
Third conviction	0	4 (9.8%)	16 (39.0%)	12 (29.3%)	2 (4.9%)	6 (14.6%)	1 (2.4%)	41 (100%)

Table A3 Age of Sexual Offenders at Time of Conviction

Conviction number	Under 16	16-18 Years	19-21 Years	22-25 Years	26-30 Years	31-45 Years	46 Years and Over	TOTAL
First conviction	0	6 (5.4%)	13 (11.7%)	17 (15.3%)	18 (16.2%)	39 (35.2%)	18 (16.2%)	111 (100%)
Second conviction	0	1 (7.7%)	3 (23.1%)	1 (7.7%)	1 (7.7%)	5 (38.4%)	2 (15.4%)	13 (100%)

Offenders Against Persons

Table B1

Sanctions for those Convicted of Common Assault and Assault Causing Bodily Harm on their First Offence

Offence	Imprisonment for one day only	Imprisonment for more than one day	Fine	Probation	TOTAL
Common assault	8 (6.3%)	14 (11.0%)	63 (49.6%)	42 (33.1%)	127 (100%)
Assault causing bodily harm	1 (1.2%)	14 (16.9%)	48 (57.8%)	20 (24.1%)	83 (100%)

Table B2

Terms of Imprisonment of those Convicted of Common Assault and Assault Causing Bodily Harm on their First Offence

Offence	Indef.	1 Day	1 Day- 1 month	1 Month- 3 months	3 Months to less than 6 months	6 Months to less than 2 years	2 Years or more	TOTAL
Common assault	—	8 (36.4%)	12 (54.5%)	2 (9.1%)	—	—	—	22 (100%)
Assault causing bodily harm	1 (6.7%)	1 (6.7%)	4 (26.7%)	3 (20.0%)	4 (26.7%)	2 (13.2%)	—	15 (100%)

Table B3

Amounts of Fines for those Convicted of Common Assault and Assault Causing Bodily Harm on First Offence

Offence	\$20 or Less	\$25-\$50	\$75-\$100	\$150-\$500	TOTAL
Common assault	22 (34.9%)	33 (52.4%)	6 (9.5%)	2 (3.2%)	63 (100%)
Assault causing bodily harm	3 (6.4%)	24 (51.1%)	16 (34.0%)	4 (8.5%)	47 (100%)

Table B4

Sexual Offenders

Sanctions for those Convicted of Indecent Assault Female, Indecent Assault Male and Gross Indecency on First Offence

Offence	Imprisonment for 1 day only	Imprisonment for more than 1 day	Fine	Probation	TOTAL
Indecent assault- female	2 (5.4%)	11 (29.7%)	8 (21.6%)	16 (43.3%)	37 (100%)
Indecent assault- male	0 —	1 (11.1%)	2 (22.2%)	6 (66.7%)	9 (100%)
Gross indecenty	1 (2.2%)	2 (4.5%)	36 (80.0%)	6 (13.3%)	45 (100%)

Table B5

Terms of Imprisonment of those Convicted of Indecent Assault Female, Indecent Assault Male,
and Gross Indecency on their First Offence

Offence	Indef.	1 Day	1 Day- 1 month	1 Month- 3 months	3 Months to less than 6 months	6 Months to less than 2 years	2 Years or more	TOTAL
Indecent assault- female	1	2	1	1	4	2	2	13
Indecent assault- male	0	0	0	0	0	1	0	1
Gross indecenty	0	1	0	1	1	0	0	3

Table B6

Amounts of Fines for those Convicted of Indecent Assault Female, Indecent Assault Male, and Gross Indecency on First Offence

Offence	\$20 or less	\$25-\$50	\$75-\$100	\$150	Not known	TOTAL
Indecent assault-female	—	4	2	1	1	8
Indecent assault-male	—	—	2	—	—	2
Gross indecency	1	9	20	4	2	36

PROPERTY OFFENCE

134 Offenders

*Conviction for Most Serious Offence After Second Conviction**

Second conviction

Property offence
109 offenders
(81.3%)

Offence against a Person
8 offenders
(6.0%)

Sexual offence
1 offender
(.8%)

Other indictable Criminal Code offence
16 offenders
(11.9%)

First conviction

Prop. 98
Off. 7

Prsn. 7
Sxl. 1
Off. Off.
Other 3

Prop. 5
Off. 0

Prsn. 0
Sxl. 0
Off. Off.
Other 3

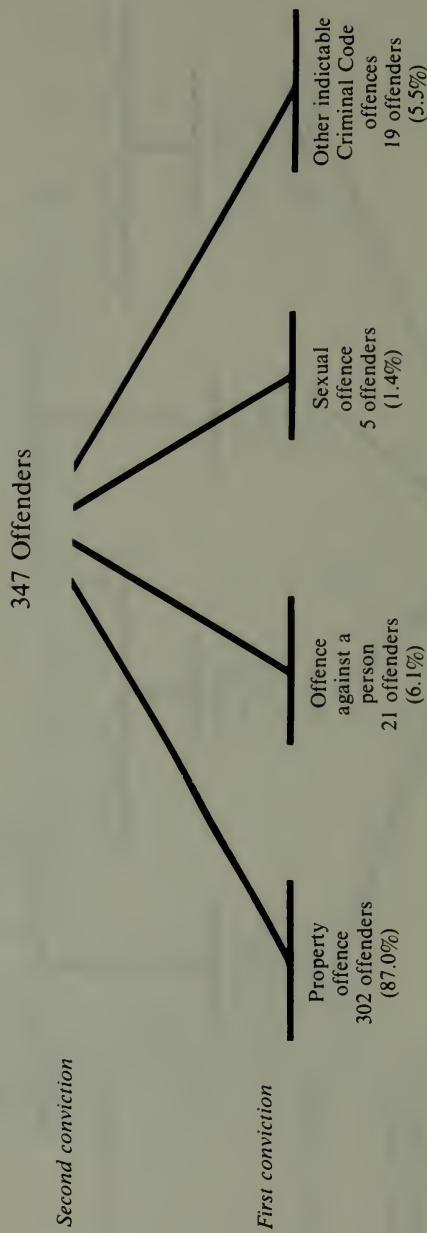
Prop. 0
Off. 0

Prsn. 1
Sxl. 0
Off. Off.
Other 0

Prop. 12
Off. 0

Prsn. 2
Sxl. 1
Off. Off.
Other 1

PROPERTY OFFENCE

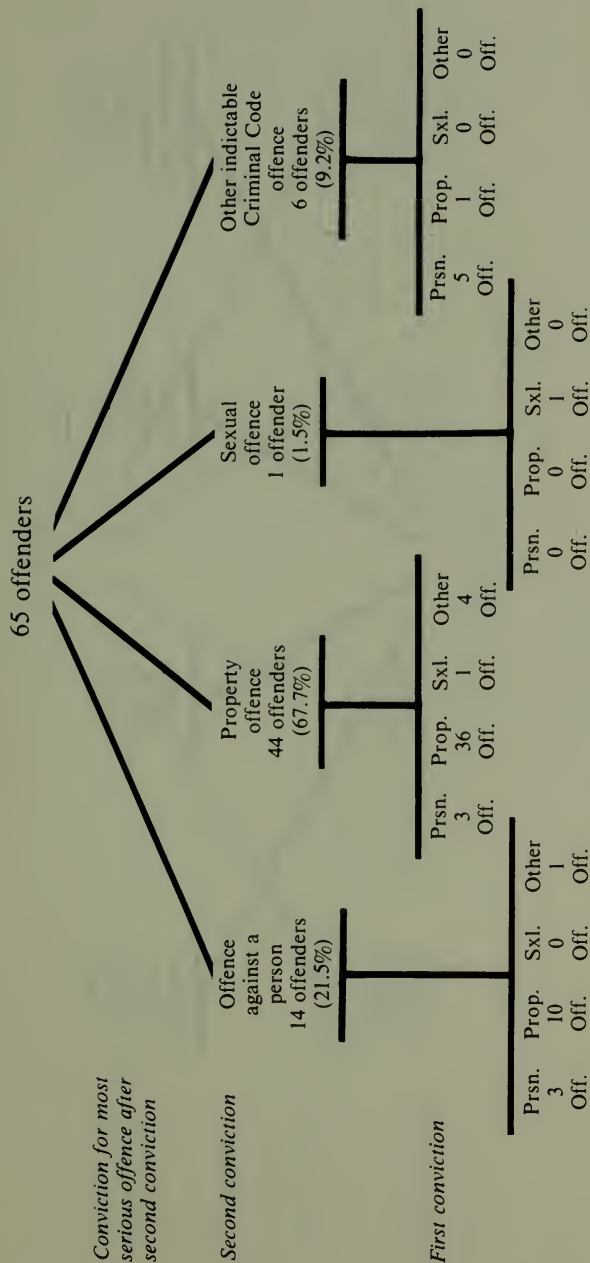


*, * From the data, it was not possible to establish whether this was a third, fourth, or fifth conviction.

Chart C2

Offenders Against Persons

OFFENCE AGAINST A PERSON



OFFENCE AGAINST A PERSON

64 offenders

*Second conviction**First conviction*

Offence
against a
person
15 offenders
(23.4%)

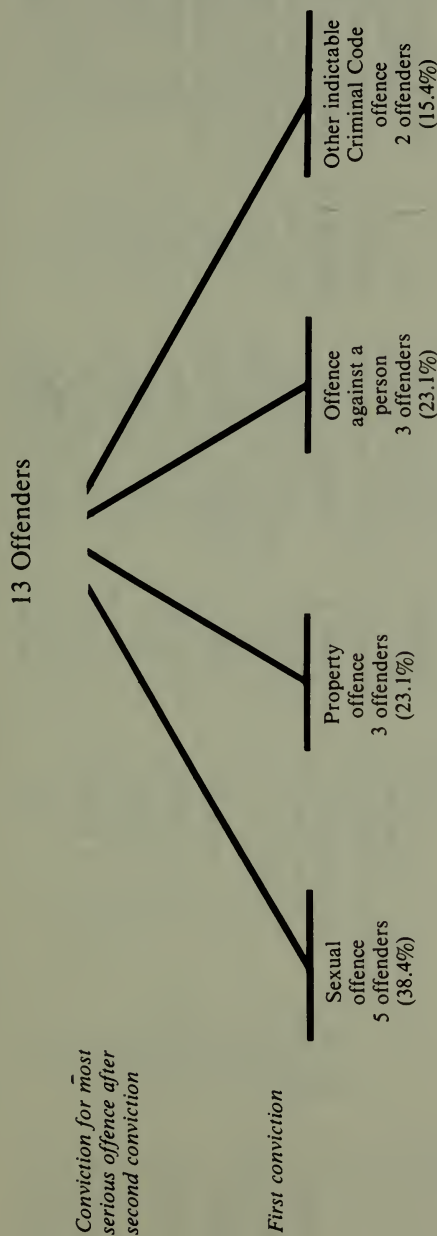
Property
offence
39 offenders
(60.9%)

Sexual
offence
1 offender
(1.6%)

Other indictable
Criminal Code
offence
9 offenders
(14.1%)

Chart C2 (Concl.)

SEXUAL OFFENCE



* Only three sexual offenders had 2 previous convictions.

Table D1

Property Offenders

Conviction number	No. of offenders fined	No. and per cent of those fined who committed a subsequent offence	No. of offenders Put on probation or given a suspended sentence	No. and per cent of those put on probation or given a suspended sentence who committed a subsequent offence	No. of offenders imprisoned for 1 day only	No. and per cent of those imprisoned for only 1 day who committed a subsequent offence
1st conviction	392	67 17.1%	714	243 34.0%	96	21 21.9%
2nd conviction	59	21 35.6%	103	43 41.7%	28	12 42.9%
3rd conviction	39	14 35.9%	41	18 43.9%	8	6 75.0%
4th conviction	22	9 40.9%	13	6 46.2%	3	0 0
5th conviction	6	3 50%	6	3 50.0%	1	1 100%

Table D2

Offenders Against Persons

Conviction number	No. of offenders fined	No. and per cent of those fined who committed a subsequent offence	No. of offenders Put on probation or given a suspended sentence	No. and per cent of those put on probation or given a suspended sentence who committed a subsequent offence	No. of offenders imprisoned for 1 day only	No. and per cent of those imprisoned only 1 day who committed a subsequent offence
1st conviction	136	24 17.6%	78	15 19.2%	13	4 30.8%
2nd conviction	32	14 43.8%	9	5 55.6%	1	0 0
3rd conviction	17	7 41.2%	0	0 0	1	0 0
4th conviction	10	5 50.0%	3	2 66.7%	1	1 100%
5th conviction	11	6 54.5%	1	1 100%	0	0 0

Appendix III

FIVE YEARS LATER

A study similar to the September Study was conducted using the records of 1,474 offenders first convicted in the first part of September 1972. We compared the results to see whether any change had taken place in sentencing practices in the five intervening years, and found that there was very little difference. The results are presented here for the categories of offences dealt with in the 1967 study: property, offences against the person and sexual offences, and an overall view of all sanctions imposed that month on first offenders.

A. Property Offenders

There were slight changes in the sanctions imposed on property offenders.

See Table A1, page 72.

The rate of imprisonment dropped from 15% in 1967 to 12% in 1972. There were proportionately more fines imposed in 1972, and fewer sentences of probation and one day; the decrease in the last two sanctions appears to be taken up in sentences of absolute and conditional discharges. The total proportion sentenced to probation or one day in 1967 is about the same as the proportion receiving these sentences or discharges in 1972.

Again we looked at break and enter and theft under separately to see the sanctions imposed. In 1972 the limit for theft under had been raised to \$200 from the \$50 limit in 1967.

See Table A2, page 73.

For break and enter there was a slight increase—2%—in the use of imprisonment since in 1967, while there were decreases in the use of fines, probation and the one day sentence, with a few cases of discharges taking up the remainder.

The use of fines increased in cases of theft under. Use of probation dropped by more than half, with sentences of discharges apparently replacing probation in many cases. One day sentences as well were used much less often. There was a small decrease in the use of imprisonment but it still accounted for one case in sixteen.

B. Offenders Against the Person

There were obvious changes in the sanctions in offenders against the person.

See Table B1, page 74.

The proportion of offenders imprisoned rose from about one in five in 1967 to about one in three in 1972. Fines were used in one-third of the cases, down from one-half in 1967. The total of offenders whose sentences were probation, a discharge or one day in 1972 was about the same as the total receiving probation or one day in 1967.

The offenders convicted of assault causing bodily harm and common assault were examined separately again. (In 1972 common assault was a summary offence, the result of an amendment to the Criminal Code in June 1972. Previously it had been either an indictable offence or an offence punishable on summary conviction; most cases were treated as the latter, but as this information was not available to us we included all cases of common assault in the 1967 Study. In the 1972 Study we retained the cases of common assault for purposes of comparison with the 1967 sentences).

See Table B2, page 75.

In the case of common assault, as in the two property offences, the total proportion of offenders receiving sanctions or probation or discharges in 1972 was about the same as the total receiving probation or one day in 1967. A somewhat lower proportion of offenders was fined in 1972, while the proportion of offenders imprisoned rose.

The rate of imprisonment for assault causing bodily harm more than doubled from 1967 to 1972, when three offenders in eight were imprisoned. The proportion of offenders fined was about two-thirds as great as the 1967 figure—a large decrease. Probation was used less often, but

the proportion of sentences of probation and discharges combined in 1972 was greater than probation in 1967. (Only one person in each group received a sentence of one day.)

C. Sexual Offenders

There were only twenty-six first-time sexual offenders sentenced in the 1972 group. The decrease was apparently a result of changes in the Criminal Code; section 157 now limits the application of the sections prohibiting buggery, bestiality and gross indecency, and in 1972 there were only two cases in these categories compared to 45 in 1967. The sentencing patterns are therefore not comparable. Sanctions in 1972 were as follows:

See Table C, page 76.

D. General Use of Sanctions

The overall pattern of sentencing seems to have changed very little, in fact, from 1967 to 1972. The sanctions imposed on this group of first offenders in 1972 are shown here in comparison with 1967.

See Table D, page 76.

E. Note—Information on the use of Absolute and Conditional Discharges varies from regime to regime. Thus, the figures used for these categories may not be complete.

Table A1

	One day	Imprisonment	Fine or Fine-or- days-in- default	Probation or Suspended sentence	Absolute discharge	Conditional discharge
1,092 property offenders convicted 1972	16 (1.5%)	131 (12.0%)	365 (33.4)	368 (33.7%)	83 (7.6%)	129 (11.8%)
1,412 property offenders convicted 1967	96 (6.8%)	210 (14.9%)	392 (27.8%)	714 (50.6%)	N/A	N/A

Table A2

	One day	Imprisonment	Fine or Fine-or- days-in- default	Probation or Suspended sentence	Discharges	Total
Break and enter, 1972	2 (1.1%)	46 (24.2%)	3 (1.6%)	128 (67.4%)	11 (5.8%)	190
Break and enter, 1967	12 (4.1%)	65 (22.2%)	9 (3.1%)	207 (70.6%)	N/A	293
Theft under \$200, 1972	5 (0.9%)	34 (6.3%)	277 (51.0%)	100 (18.4%)	127 (23.4%)	543
Theft under \$50, 1967	40 (6.8%)	47 (8.0%)	268 (45.8%)	230 (39.3%)	N/A	595

Table BI

There were more obvious changes in the sanctions imposed on offenders against the person, which can be seen in the next table.

	One day	Imprisonment	Fine or Fine-or- days-in- default	Probation or Suspended sentence	Absolute discharge	Conditional discharge
190 Offenders against the person, 1972	1 (.6)	59 (34.7%)	59 (34.7%)	33 (19.4%)	7 (4.1%)	11 (6.5%)
287 Offenders against the person sentenced, 1967	13 (4.5%)	60 (20.9%)	136 (47.4%)	78 (27.2%)	N/A	N/A

Table B2

	One day	Imprisonment	Fine or Fine-or-in- days-in- default	Probation or Suspended sentence	Discharges	Total
Common assault, 1972	0 (0.0%)	8 (17.8%)	20 (44.4%)	7 (15.6%)	10 (22.2%)	45
Common assault, 1967	8 (6.3%)	14 (11.0%)	63 (49.6%)	42 (33.1%)	N/A	127
Assault causing bodily harm, 1972	1 (2.1%)	18 (37.5%)	15 (31.3%)	9 (18.6%)	6 (12.0%)	48
Assault causing bodily harm, 1967	1 (1.2%)	14 (16.9%)	48 (57.8%)	20 (24.1%)	N/A	83

Table C

	One day	Imprisonment	Fine or Fine-or- days-in- default	Probation or Suspended sentence	Discharges
26 Sexual offenders sentenced	0	11 (42.3%)	7 (26.9%)	8 (30.8%)	0

Table D

	1972	1967
One day	21 (1.4%)	5.8%
Imprisonment	230 (15.6%)	16.4%
Fine	60 (4.1%)	3.9%
Fine or Days in default	471 (32.0%)	31.4%
Probation or Suspended sentence	444 (30.1%)	42.5%
Absolute discharge	99 (6.7%)	N/A
Conditional discharge	149 (10.1%)	N/A
TOTAL	1,474 (100%)	100%

Appendix IV

A SHORT NOTE ON OUR METHOD

In June 1973 the Law Reform Commission began collecting data for a study of sentencing and recidivism of persons convicted of indictable Criminal Code offences. The group chosen was all offenders first convicted in September 1967. All subsequent convictions of these offenders were included in the study.

For purposes of this analysis the most serious offence which resulted in a conviction in any one entrance into the criminal justice system was used as the base unit, so that each offender appeared once in our study for each such occasion regardless of the number of charges involved in each episode. For example, an offender charged with theft, possession of stolen goods and assault to resist arrest, and convicted only of the last two charges, would appear in our study as a case of assault to resist arrest since that is the most serious of the two charges which resulted in conviction. The sentence received on that charge is the sentence counted in the study.

Similarly the most serious sentence was used for the study of sentencing when a combination of two or more sanctions was imposed. If an offender was fined and ordered to pay restitution, the fine was used; if a fine was imposed in addition to a term of imprisonment, the imprisonment was the sanction used in the study. The other sanctions remained available and were examined in the case of additional sanctions on a sentence of one day imprisonment.

We did not have data on disposition of sentences of fines with the alternative of imprisonment in default of payment. Accordingly all such cases are counted as fines rather than imprisonment although in fact some resulted in incarceration.

When the comparison study was begun we took case records of offenders first convicted in September 1972.

Release Measures in Canada

by

Pierre Landreville

Pierre Carrière

Contents

	Page
Introduction	83
Remission	85
1. General History	85
(A) Origins	85
(B) First systems	87
(C) Remission in the United States	89
2. Remission in Canada	91
(A) Legislation	91
(B) Administration of the law	95
(1) Statutory remission	95
(2) Earned remission	96
(3) General observations	97
3. Summary	98
References	101
Parole	103
1. Definition	103
2. Origin	104
3. Evolution in Canada	107
The statute of 1899	107
The Fauteux Committee	110
The Ouimet Committee	111
4. Termination of Parole	112
The Hugessen Task Force	113
The Goldenberg Committee	114
5. Concepts of Parole	115
(A) A Measure of Clemency	115
(B) A Selective Measure	115
(C) A Period of Transition	118
References	124

Day Parole and Temporary Absence	127
1. Origin	127
(A) Prison Labour	127
(B) Theoretical Development	129
2. American Experience and Legislation	130
3. Notions of Semi-release and Semi-detention	132
4. The situation in Canada	133
(A) Preliminary Observations	133
(B) Day parole	134
(1) Definition and Principles	134
(2) Criteria of Application	135
(3) Criticism	136
(C) Temporary Parole	137
(D) Temporary Absence	138
(1) The law	138
(2) Administration	138
(3) Criticism	140
(E) Summary	141
References	144
Bibliography	149

Introduction

Sentences of imprisonment may be fixed, indeterminate or indefinite. In the first case, the date of release may be determined by the sentence which the court must pass by law. However, as in Canada, the courts can generally impose fixed sentences within limits set by law.

An indeterminate sentence is one in which the court does not set any limits. The date of release is decided by an administrative board. Very few countries subscribe to true indeterminate sentences. Such sentences are passed in Canada only in the case of dangerous sexual offenders where legislation provides for a sentence of preventive detention. The Commission's study paper on dangerous offenders discusses this question in depth.

Finally, an indefinite sentence is one in which an administrative board sets the term of the sentence within limits specified by the court. However, such sentences are often called indeterminate sentences. They exist in Ontario and British Columbia by virtue of the Prisons and Reformatories Act.

In Canada, sentences of imprisonment may only be pronounced by the courts and they are generally fixed within limits provided by law. In practice, however, they become indefinite sentences. The sentences imposed by the courts become maximum sentences which very few inmates serve completely *in prison*.

Indeed, although there is only one way to be sent to prison, there are many ways to leave it. Inmates may be released before the end of the term set by the court either by an act of clemency, by application of the legislation which provides for the remission of one quarter of the inmate's sentence (statutory remission), because the inmate has earned a remission by his work, diligence and industry, or by an administrative decision of the Parole Board, which has the power to release an inmate anytime after he has served part of the prison term set by the Governor in Council.

All these measures, and especially parole, have the effect of changing fixed sentences into indefinite sentences. These measures are applied by different authorities, have different goals and purposes and may be applied under different terms and conditions. They may very often contradict each other and even cancel their respective effects. Some measures may have developed by varying their original objectives and may even sometimes have become pure red tape having lost sight of their objectives, as we will attempt to show in this study paper.

Remission

1. GENERAL HISTORY

We will first review the original penological ideas and experiments on remission. We will then examine three initiatives at systematizing this release measure in various penitentiary systems, which gave remission a meaning and form which still exist today but under more complex terms and conditions.

We will also observe that the remission system was most widely accepted in the United States where a large number of States adopted pertinent legislation. We will therefore describe the American experience in this area¹.

A. *Origins*

The first reported case of remission dates back to 1597 in Holland (Sellin, 1944, p. 45). An inmate condemned to twelve years' imprisonment became eligible for a remission. Sentencing dispositions provided that if the administrator could attest to the inmate's good conduct and future rehabilitation, after having served eight years, the last four years would be subject to remission.

In the same country, from 1599 to 1603, Amsterdam prisons (called Tuchthuys) made an annual review of sentences. Each year, accompanied by a clerk, inmates appeared before the high judge and magistrates who then decided on the remission or extension of sentences on the basis of recommendations by the administrators. Such recommendations considered the inmates' good conduct, their assistance in preventing escapes, their testimonies against accomplices and all other forms of assistance to the administration.

During the XVIIIth century, in 1775, Vilain XIII, high judge of Flanders, believed that the law was unfair by allowing sentences to be extended for misconduct in prison. He therefore recommended that inmates

who behaved well should be granted a form of pardon before the end of their terms set by law (Sellin, 1959, p. 108 and Attorney General's Survey, 1939, Vol. IV, p. 495).

In England, in 1785, W. Paley proposed that inmates be required to perform a specific amount of work instead of serving a term in prison. The inmate's diligence at work would then have a direct effect on the amount of time he would spend in prison. Paley thus rejected sentences measured only in time (Sellin, 1951 and 1959, p. 108). Along the same line, Benjamin Rush wrote in 1787 in the United States that punishment should consider the criminals' character and their progress towards rehabilitation. In his opinion, the law should define and choose a variety of penalties without reference to a specific crime. The length of the punishment, although limited, should be unknown to the inmate. This was an early definition of the theory of indeterminate sentences (Barnes and Teeters, 1952, p. 521).²

During the 1800's, Spain also adopted legislation to introduce the notion of remission and rehabilitating work in the penal practices of that period. In 1804, an order on naval prisons enacted that inmate rehabilitation had to be carried out by means of intensive apprenticeship as well as specific and useful work for society. This order was included in a general order issued in 1834 which applied to all the prisons of the Kingdom (Drapkin, 1968, p. 334). Two regulations (1805 and 1807) had preceded this order, one permitted the commutation of sentences for good conduct at the Cadiz prison, and the other, with a more general application, established a remission of two to four months per year for certain inmates (Sellin, 1959, p. 108).

In 1825, in Geneva, the act on prison administration provided a remission for inmates with good conduct. After having served two thirds of their sentences, interested inmates had to present a request for a reprieve to an ad hoc commission which either granted immediate release, set a later date for appeal or denied the request (Lucas, 1828, p. 289).

In 1827, in France, Charles Lucas proposed an elaborate plan under which an inmate had to advance through different stages, and which for all practical purposes, made his sentence completely indeterminate. A disciplinary committee had real discretionary powers on the length of the inmate's detention by the application of successive remissions (Normandeau, 1972, p. 144).

We have briefly summarized the history of the original ideas and experiments carried out with respect to remission, which we can relate to the philosophical trends of the XVIIIth century and beginning of the XIXth century.³

Prison sentences ceased to be only punishment. The inmate's rehabil-

itation was slowly recommended and taken into consideration as a sentencing objective. Similarly, work became an element of reform and was used positively. As the sentencing objectives slowly changed, a means of achieving these objectives was sought and flexibility of the sentence seemed to be the answer.

According to the historical data presented earlier, remission took the form of a simple pardon or became a method of reducing the sentence granted under certain conditions. It always led to a release prior to the end of the term set by the court. The inmate's reform, his good conduct and performance at work were usually taken into account in the decision on remission. This release prior to the termination of the sentence was a fundamental characteristic and was not subject to any conditions. The first sentence was then considered as having been completely served.

B. *First Systems*

Until now, remission was considered to belong to new penal practices and ideas⁴. From the practical point of view, it brought flexibility to the execution of sentences, and from the theoretical point of view, it implied a growing connection between good conduct, work and release following rehabilitation.

Three initiatives⁵ at systematizing these penological ideas and practices marked the development of remission and contributed to its integration in the penal systems under forms which still exist today.

Colonel Manuel Montesinos y Molina was the first to apply to the Valence prison in 1835, what could be called the foundations of a progressive system. He was convinced that inmates would be more apt to reenter society if they were given more trust in a progressive manner⁶. His prime objective being rehabilitation, he set up a system based on trust and consisting of three separate stages. The purpose of the first stage, which consisted of isolation and unpleasant prison maintenance work, was to appeal to the inmate's gregarious instincts and to form working habits in him. This first stage ended when the inmate's repeated requests to be assigned to a workshop were deemed sincere. In the second stage, he was transferred to a common dormitory and assigned work corresponding to his talents and aptitudes. Montesinos considered that work was the best means of reforming inmates. Work became the expression of the inmate's free will.

The last stage consisted of an "intermediate release" and entailed successfully passing a series of tests. A maximum amount of trust was placed in those inmates who had shown diligence at work and excellent behaviour and who had earned the trust of director Montesinos. These inmates were then granted leaves without escort (nowadays called temporary

leaves). They performed messenger services outside the prison and participated in administrative prison tasks. These inmates were allowed to communicate freely among themselves and to receive visitors, parents and friends. They also completed the apprenticeship of a trade (Drapkin, 1968, pp. 335-336).

Remission was a privilege granted by the prison director at the end of the "prison experience" to those who had successfully passed the tests of confidence and acquired a trade. This reward for good conduct and continued diligence at work could amount to one third of the sentence (Lindsey, 1925, p. 10 and Tappan, 1960, p. 716).

In 1840, Alexander Maconochie applied in Norfolk Island a penal system which he invented and called the "mark system". He invented this system on his return from a state mission at the Van Diemen's Land penal colony. He had been asked to render account of its administration before the parliament. With the objective of reforming inmates, he set forth that the time required for inmates to develop self-control depended on a variety of circumstances and on the inmates' reactions to them. He recommended that the period of imprisonment be indefinite. In practice, the period of imprisonment corresponded to a goal to be achieved by the inmate. This goal or task to be performed was measured in points and the time spent by an inmate in accomplishing this amount of work had a direct effect on the length of his incarceration. The system consisted of three separate stages. The first stage, called the "penal stage", involved very strict discipline and consisted of grouping inmates in work teams of six. Each team member gave his opinion on the choice of his working companions. In the second stage, called "social stage", the six inmates in a team pooled their points which were equally divided among them each day as well as the cost of their feeding or fines incurred for having violated prison discipline. During the last stage, each inmate became independent again in his work and other activities. He accumulated points and even administered his own property (Barry, 1958, pp. 69-79).

Remission related to the number of points accumulated only. Work was remunerated daily with ten points. Points earned were redeemable at the rate of ten points per day of sentence⁷. Inmates had to buy their daily rations with a variable number of points and their savings out of the ten points earned each day were credited towards remission. Inmates could thus save up to five points a day. Additional points were awarded for additional or more difficult work. Any violation of the rules was punished with a fine payable in points. Violations therefore had a direct effect on the length of incarceration (Barry, 1972, p. 93).

In 1854, Sir Walter Crofton adopted the "points" system developed and applied by Maconochie and integrated it in the Irish penal system. The first stage consisted of isolating the inmate for a variable length of

time depending on his conduct estimated in "points". During the second stage, the inmate was transferred to another prison where he was able to work with the other inmates and accumulate "points", progressing through a system of five grades until he became eligible for another transfer to an intermediate prison⁸. There, the inmate worked in an atmosphere practically free of discipline so that his only motivation to carry out his routine activities rested on his personal interest and moral values. His sentence ended with a "ticket-of-leave" paired with some form of assistance⁹.

The remission aspect was just as important in the Irish system as in the system recommended by Maconochie except that it lost its priority during the intermediate stage (Pears, 1872, p. 417). Maximum possible remission amounted to one quarter of the sentence calculated after deducting the length of time spent in isolation.

These three men of action were the first to work out a penal system with the reform of inmates in mind and, as a corollary, they created a method which made the length of imprisonment flexible. Remission was included in the system as directly related to the inmates' work and conduct. Since that time, the notion of remission has been accepted and applied in the various penitentiary institutions.

Remission already possessed its main characteristics:

- It is a means of reducing the sentence and motivating inmates to reform by participating in the program.
- It is a means of making the fixed sentence flexible.
- Part of a system of progressive classification of inmates, it is a means of recording the inmates' conduct on a daily basis.
- It is related to work (or participation in the program); indeed, remission days are earned by continued effort; the sentence is thus partly measured in terms of amount of work performed.
- It is related to conduct; indeed, violations of regulations are deducted from days accumulated; it is therefore a means of control.

C. Remission in the United States

As early as 1817, the State of New York passed legislation on remission and was the first state to adopt a "good time" law. This law provided for a remission of up to one quarter of sentences five years and under (Sutherland, 1966, p. 577). It seems, however, that this law was not applied in practice and we have been unable to find any explanation for this in available documentation. It was nevertheless the first such law to be voted in the United States.

Sutherland (1966, p. 577) reports that Connecticut adopted a remission law in 1821 with respect to inmates sent to work-houses. Then,

the Tennessee Act of 1836 authorized the governor of the state to reduce the sentence of an inmate by a maximum of two days for each month of the sentence. Sellin (1959, p. 108) compares this American law with the model proposed by Viscount Vilain XIII in 1775, which we have mentioned earlier.

These were the very first American remission laws. Remission, as a release measure, only grew in popularity during the XIXth century after the American Civil War (Sutherland, 1966, p. 577), under the influence of the Irish system and its propagandist, Sir Walter Crofton. According to Sellin (1959, p. 108), the bill passed by Ohio in 1856 was the one which had the most influence on the subsequent American laws.

The growing acceptance of this measure is due to a sharp increase in the population of American prisons, as demonstrated in the following table:

Prison Population in the United States and American Territories 1850–1890		
Census year	Prison population	Fraction of total U.S. population
1850	6,737	1: 3,442
1860	19,086	1: 1,647
1870	32,901	1: 1,171
1880	58,609	1: 855
1890	82,329	1: 757

Source: M. B. Miller (1974).

There were several reasons for the adoption of these “good time” laws. Giardini (1958, p. 3) discusses five which still have a contemporary value. Remission was used:

- As a means of discharging prisoners more quickly, without involving pardon procedures.
- As an alternative, to compensate for the harshness of sentences in a spirit of fairness.
- As an effective means of control in solving disciplinary problems.
- As an incentive for inmates to perform the work assigned to them in prison.
- As a means of rehabilitation: the inmate’s attitude is almost always provided for by law. He must work “with diligence” and obey regulations “willingly”.

In spite of the variations from one state to another, American laws always show similar characteristics with respect to the following: daily records must be kept on the inmate's conduct and performance at work; the progressive attribution of remission days is provided as well as forfeiture and restoration procedures.

American "good time" laws have often been the subject of controversy both from the theoretical and practical points of view. From the theoretical point of view, they often contradict the laws which recommend the use of indeterminate sentences.

The supporters of indeterminate sentences, who place emphasis on treatment, consider that remission is an anachronism which still allows sentences to be based on time. Giardini (1957) cites two decisions to demonstrate the incompatibility between indeterminate sentences and remission. In 1913, the Attorney General of Pennsylvania enacted that an inmate condemned to an indeterminate sentence was not eligible for remission. In 1927, a Washington court realized the absurdity of the simultaneous application of both legislations.

From the practical point of view, the application of remission entails increasingly complicated administration which makes it difficult to achieve objectives¹⁰.

The Attorney General's Survey (1939, p. 511) concluded that remission should lose some of its usefulness due to the possibilities of parole and well-adapted institutional programs. Remission should nevertheless be retained until three prerequisites have been met: a flexible parole law, a well-administered parole system, and a modern penitentiary system¹¹.

American history has not influenced penological philosophy by its legislation on remission. It is the influence of the Irish system and the increase in prison population which sparked the expansion of this release measure which has become more of a simple method of control applied more or less automatically.

2. REMISSION IN CANADA

(A) *Legislation*

As early as 1868, in accordance with the powers defined by legislation relative to Confederation, a first law on penitentiaries was voted: "An Act respecting Penitentiaries, and the Directors thereof, and for other purposes"¹². Section 62 of this act authorizes the Directors of Penitentiaries to make rules and regulations for the keeping of records on the daily conduct and attitude of each inmate so as to determine his right to a reward in the form of a remission of a certain number of days. The max-

imum allowable number of days' remission per month was five, and in the case of inmates who were unable to work, this maximum was two and a half days.

In 1883, another law was passed which modified somewhat the provisions on remission¹³. It introduced a progressive system of remission. Once an inmate had accumulated thirty days' remission at a rate of five days per month, he was allowed seven and one half day's remission per month, and once he had one hundred and twenty days' remission at his credit, he could increase the number of remission days earned each month to ten.

In the case of illness rendering the inmate unable to work, he could nevertheless earn half of the remission to which he was normally entitled.

The law specified that certain offences entailed the total forfeiture of the remission earned prior to the infraction, such as: escapes or attempted escapes, attempted or actual prison breakings, cell breaking or any other alterations made with the intention to escape, and finally, assaults on penitentiary officers.

A law voted in 1906¹⁴ made three changes to the existing provisions on remission. First, it was more generous by raising the number of days earned per month to six days and to ten days after the first seventy-two days' remission had been accumulated. In the case of illness, an inmate could still earn the total number of days' remission per month, at the discretion of the director with the concurrence of the appropriate minister. A breach of parole was considered as an additional infraction and entailed the total forfeiture of the remission earned.

Then, the provisions on remission were not amended again until 1961¹⁵. In the meantime, a royal commission of inquiry and a committee made recommendations which we will now examine.

The report of the Royal Commission to Investigate the Penal System of Canada (Archambault, 1938) summarized its observations on remission for good conduct, diligence and industry at work in a single recommendation: simplify the rules of application of this measure. The commissioners discussed five regulations. They deplored the fact that remission was only calculated after an initial waiting period of six months. Inmates were thus deprived of this incentive measure provided by law for the first six months of their sentences. The commissioners also considered that the regulation according to which all remission was forfeited after an offence, was very harsh. If the inmate's conduct or attitude at work changed after the penalty, the latter should not be permanent and remission should again be used as an incentive.

Once confirmed, an inmate's illness should not result in the forfeiture of remission. The rule which authorized the directors to deny remission

under such circumstances was unfair. It extended the prison term of sick inmates while inmates in good health were able to accumulate the maximum number of days' remission.

The commissioners also contested the regulation, not provided by law, which limited the possibility of earning remission to working days. Finally, they demanded that consecutive sentences be considered as a single sentence for purposes of calculating remission. This would particularly avoid the repetition of the six months waiting period imposed by another regulation.

The commissioners therefore did not contest the measure but its application as observed at the time of their inquiry. Their only recommendation was intended to eliminate "mean and vexatious" regulations and to improve the information provided to inmates by establishing simple regulations and by keeping inmates regularly informed on the number of days they have earned (Archambault, 1938, p. 246).

The Committee appointed to inquire into the Principles and Procedures followed in the Remission Service first analyzed remission in relation to parole. The practice of forfeiting all earned remission when a paroled inmate is punished with forfeiture was deemed debatable. This criticism was based on the absence of relationship between the motives for earning remission and the subsequent conduct of the paroled inmate. However, because of its strong deterrent effect, it was recommended that the decision to forfeit remission in whole or in part be made by the Parole Board (Fauteux, 1956, p. 61).

Although the authors of the report did not examine the merits of statutory remission, they observed certain irregularities and injustices with respect to the application of this release measure which did not benefit all inmates equally, depending on whether the inmate was condemned to two years or to two years minus one day, depending on the institution where the sentence was served and depending on the remission earned during the first year (Fauteux, 1956, p. 64).

Furthermore, even though remission was supposed to be calculated on a monthly basis, as provided by law, this requirement was practically never met. Each inmate was awarded the maximum remission from the total of which offences were deducted. This prompted the authors of the report to recommend that the application of this measure be uniform and practical and that this release granted for good conduct, diligence and industry at work correspond to a period of mandatory release.

The observations made in these two investigative reports suggest that the application of remission is far from compatible with promoting good conduct and a positive attitude at work. Indirectly, the authors recommended the further integration of this measure in other elements of a re-

habilitation program, such as the classification of inmates, remuneration of their work and mandatory parole. This had been the situation of remission prior to the amendments made in 1961.

When presenting the new law in 1960-1961, the minister reiterated that remission was granted for good conduct and diligence at work (Fulton, 1961). Maintaining these two objectives, he commented on the joint use of remission and parole.

First, both measures should be an incentive for inmates to reform during their term in prison. Secondly, the period on parole should allow a sufficient period of time for supervision. Finally, inmates should be encouraged to accept parole when offered to them so that fewer of them would prefer to be released only at the end of their sentences.

The minister's comments demonstrated that the new law was intended to correct three situations which prevented the compatible application of remission and parole. First, the promotion of one measure should not cancel the other. Inmates should be able to count on both measures. Furthermore, the granting of remission should not unduly shorten the future period of supervision during parole to the extent that it would jeopardize its effectiveness. Finally, the date of release determined after the calculation of remission should not become an incentive for inmates to prefer a later date of release without control to immediate release on parole.

The bill proposed several solutions for the compatible application of both measures and also reacted to the comments made in the Archambault and Fauteux reports. It established two forms of remission: statutory remission and earned remission. The first amounts to one quarter of the sentence. It may be forfeited by reason of bad conduct and is applicable to parole. The second remission is accumulated at a rate of three days per month provided the inmate applies himself to his work. Once earned, it may not be forfeited and is not applicable to parole.

By granting statutory remission upon admission to a penitentiary, the law thus eliminated the six months waiting period provided in previous regulations. A disciplinary board decides on the forfeiture of remission which is limited to a certain number of days even in the case of escapes or attempted escapes. The regulation which prohibited the restoration of forfeited remission days was thus abolished.

By introducing two forms of remission, the minister reconfirmed the primary objective of granting remission for good conduct, diligence and industry at work. He clearly distinguished these two criteria which are still included in the present Penitentiary Act.

The changes made to the Penitentiary Act by the 1968-69 act are very

small and were altogether intended to conform the legal provisions with practices¹⁶. This law is still in effect today. The commissioner may delegate to an officer his power to forfeit statutory remission and to remit the forfeiture. The offence of escaping is specifically included in the paragraph which provides for the forfeiture of statutory remission.

The earned remission granted to inmates who "applied themselves industriously to their work" by virtue of the 1960-61 act is now dependent upon their assiduous participation in the penitentiary program. Article 24 of the act also indicates that earned remission cannot be forfeited for any reason whatsoever. This provision was eliminated in the 1968-69 act which specifies rather that inmates may benefit from earned remission equal to that they had earned prior to the revocation or forfeiture of their parole or mandatory release. This seems to contradict articles 20 and 21 of the Parole Act which include in the prison sentence to be served any period of remission, including earned remission, then standing to the inmate's credit.

This 1968-69 law known as the "Omnibus Bill" was the subject of lengthy debates in the House of Commons. However, the articles regarding remission seem to have unintentionally escaped notice. We are led to believe that the articles were simply amended to bring them up to date for administrative reasons.

(B) *Administration of the Law*

(1) *Statutory Remission*

As required by law, this form of remission is credited to the inmate upon his admission to a penitentiary. He is credited with the entire amount of statutory remission unless found guilty, during his detention, of a *serious or flagrant offence* (Commissioner's Directive no. 213, para. 7) punishable by forfeiture of statutory remission. Such forfeiture may apply to part or all of the remission credited to the inmate upon his arrival. As stipulated by law, no forfeiture of more than 30 days shall be valid without the concurrence of the Regional Director, nor more than 90 days without the concurrence of the Commissioner. When informed of his penalty, the inmate is also informed on the possibility of a partial or total remission in the interest of his rehabilitation (Commissioner's Directive no. 217, para. 3).

What is considered as a serious and flagrant offence? From a list of fifteen possible offences by inmates (Penitentiary Service Regulations, no. 2.29), twelve have been designated by the Commissioner as serious and flagrant offences. In spite of this list, it is up to the director of the institution or to an officer designated by him to determine the category of of-

fence, taking into consideration the circumstances surrounding each incident (Commissioner's Directive no. 213, para. 9).

An inmate's request to restore the forfeiture of statutory remission cannot be presented before a period of twelve months has elapsed following the offence. As in the case of forfeiture of statutory remission, the restoration of statutory remission of more than 90 days may only be authorized by the Commissioner. His recommendation must establish the circumstances of the forfeiture, comment on the inmate's behaviour since such forfeiture, comment on the inmate's earned remission file, and finally, contain an explicit recommendation on the part of the request to be acceded to.

It is not an overstatement to conclude that the opportunities to forfeit statutory remission are many and that the director of the institution has wide discretion in applying this measure. Furthermore, although the remission procedure may seem to reduce strictness, in practice, it is certainly difficult for inmates who are inclined to defy regulations to meet remission conditions.

(2) *Earned Remission*

This form of remission is granted each month by the classification committee to the inmates who apply themselves industriously to their work. For purposes of applying this measure, work is defined as participation in the activities that are part of the approved program of inmate training in which inmates are authorized or required to participate (Commissioner's Directive no. 218). By their attitude, inmates must demonstrate their interest in rehabilitating and participating in the program.

Earned remission is denied to all inmates who are not available for work for five consecutive days for the following reasons: disciplinary offence, punitive dissociation, illness or injury attributable to their own negligence or fault, and any other reason attributable to their own fault. It is also denied when inmates are absent from work by reason of escape or attempted escape. Finally, it is not granted when the disciplinary board finds an inmate guilty of a serious and flagrant offence penalizing him with forfeiture of statutory remission.

An inmate who is not available for work because he is lawfully absent from the institution is allowed earned remission. However, his conduct during such absence will be taken into consideration.

It is readily noticeable that the definition of the word "work" and of the expression "applies himself industriously to his work" (Commissioner's Directive no. 218) as established in 1963 and maintained until now, allows this measure to be used as a means of control. Indeed, by dis-

tinguishing two forms of remission, the 1960-61 provisions reconfirmed the direct relationship between this measure and two aspects of institutional life: work and behaviour. Moreover, this point of view agrees with the objectives of promoting work and good conduct pursued by the previous laws on remission. It is the directives issued by the Commissioner which made it possible to use this measure as a means of control by extending its application to all aspects of institutional life. The amendments made in 1968-69 simply sanctioned the control aspect which was already well-established in practice.

(3) *General Observations*

The directives mentioned earlier do not give any indication of the red tape involved in the application of this law. Indeed, it is the accounting of remission which makes it possible to set a release date. Statutory remission is credited upon admission to the penitentiary and earned remission is credited on a monthly basis. A variety of circumstances may complicate this administrative task, such as the transfer of an inmate to a provincial prison to give testimony or stand trial, his absence at work for medical or humanitarian reasons or to assist in his rehabilitation, periods when a prisoner is in custody as a result of the suspension of his parole (divisional instruction no. 334), the procedure involved in a request for restoration of forfeited statutory remission, the revocation of parole. All these circumstances must be taken into account in the calculation of remission. They create a considerable amount of red tape which burdens the administration of this law.

Let us now examine the application of this measure and its real impact on the behaviour of inmates and their participation in programs. Information provided on *statutory remission* by the Commissioner of Penitentiaries indicates that it is used as a disciplinary measure for 23% of the population of maximum and medium security institutions. This "disciplinary" measure is forfeited in 70% of cases penalized¹⁷. This data contrasts with the situation in Quebec where available information indicates that remission is used as such for only 8% of the entire population of Quebec institutions¹⁸. We must note that, in most cases, forfeiture of remission is the result of an escape or failure to report to the institution within the prescribed time in the case of temporary leaves or day parole. This entails an automatic forfeiture of remission as stipulated by law¹⁹. We are thus led to the conclusion that remission is only used as a means of control and that this use remains restrictive. Approximately 7% of the prison population of Quebec forfeits a certain number of days' statutory remission. Furthermore, this measure is applied very inconsistently throughout the country, a situation which is bound to be prejudicial to certain inmates.

In Quebec, *earned remission* is used in a manner very similar to statutory remission. Approximately 3% of the inmates do not earn 3 days' remission per month mostly due to their absence from work for five consecutive days. Forfeiture is in actual fact a consequence of a penalty of five days' dissociation or more for a violation of regulations. It is apparent that, in its two present forms, forfeiture of remission does not constitute a penalty but really a double penalty for certain violations of regulations or of the law.

3. SUMMARY

The history of remission has shown its slow emergence from a penal system centered on punishment which often took the form of sordid corporal punishment such as banishment and transportation. Recommended by philosophers, it was timidly experimented with and substituted for corporal punishment, placing emphasis on the inmate's conduct and rehabilitation at work. Remission also added the necessary flexibility to fixed sentences in accordance with the new penal ideas.

Then, thanks to the initiatives of three prison directors (Montesinos, Maconochie and Crofton), remission compelled recognition as an effective means of promoting the new relationship between behaviour, work and rehabilitation. Montesinos stressed the importance of work and Maconochie succeeded in placing the responsibility of their own future on the inmates themselves by applying his point system. Crofton who perfected and further developed this system asked the participants in the London congress in 1872:

to recognize in the existing system many of the things they desired, such as the abolition of fixed sentences, and the substitution of a labour sentence for a time sentence. (p. 417)

We also mentioned that a man could reduce his sentence by his diligence and industry at work and explained the integration of remission in the existing penitentiary system of Ireland based on a progressive regime.

Remission could then be defined primarily as a means of reducing the sentence and motivating inmates in a rehabilitation program. As a means of reducing the sentence, it is an incentive, giving the inmates the opportunity to affect the length of their confinement. As a means of participating in a progressive rehabilitation program, it is an incentive to good behaviour since the inmates' conduct and diligence at work are reviewed on a daily basis.

These were the first objectives of remission prior to its expansion during the XIXth century, especially in the United States. Other motives then appeared to justify the use of this measure. It became an effective

means of control solving many disciplinary problems. It was no longer considered as an incentive and as an indication of behaviour. Applied automatically, it was no longer an incentive to work. From the administrative point of view, it was often merely a guarantee of the flexibility of the sentence, which was no longer necessary considering the penological developments regarding imprisonment and release measures.

All these measures reflect penological considerations on the place and development of remission, considerations which affected the history of remission in Canada which we will now examine.

The objectives of the Canadian law on remission of 1960-61 were clearly related to the inmate's conduct and work. However, present directives which date back to 1963 insist on behaviour through an enlarged definition of the word "work" and give wide discretion to the directors in the punishment and definition of offences. These directives undoubtedly reveal the legislator's intention to theoretically transform remission into a means of control over all of the inmates' activities. The 1968-69 law acknowledged this aspect of control by substituting the word "program" for "work". In our opinion, a well-adapted program can be an incentive to participate. The amendments made in 1968-69 further revealed the legislator's intention to recognize an objective of control. Objectives have changed since 1960. In order to avoid the type of criticisms made in the Archambault (1938) and Fauteux (1956) reports which denounced certain regulations and irregularities in the application of this measure, its administration was made more complicated to provide for all situations likely to raise new criticism.

Because it no longer meets its original objective, and because penitentiary practices provide other means for motivating inmates, statutory and earned remission should be completely abolished and withdrawn from our penal system²⁰. We do not think that the withdrawal of this measure would cause an increase in the population of provincial prisons if the number of persons sent to prison is limited by a continued sentencing policy.

Imprisonment involves participation in programs which in themselves possess motivating elements. Let us examine certain recommendations which have already been made regarding the motivation of inmates by their participation in programs which involve the classification of inmates and remuneration of their work. It is time to give meaning to regulations through rehabilitation programs which would offer immediate privileges from which inmates could benefit each day and not only at the end of their prison term. Remuneration of work could become a motivating factor provided it takes into consideration the inmate's real performance at his designated task and provided it corresponds to a responsibility for each inmate.

Parole conceived as a period of transition and readaptation would correspond to the present needs of persons deprived of their freedom. It would also be an opportunity to extend the objectives of social reentry with assistance in the community. In our opinion, parole is another important incentive for inmates and is also a realizable objective for inmates who participate.

References (Remission)

1. We will not examine the history of remission in France because of its too recent adoption there (statute no. 72-1126 of December 29, 1972). J. Marc's first observations (1973) reveal that the legislator took into consideration the British experience and the integration of this measure in the present structures of the system; he made it an essentially optional measure based on the individualization of sentences.
2. Cf. Barnes, H. E. and Teeters, N. K. (1959, pp. 335-337 and pp. 417-425).
3. Especially Montesquieu, Voltaire, Bentham and Beccaria.
4. The penal practices and ideas mentioned here refer to the very first prison experiments carried out in Rome at the St-Michel prison and in Gand at the Maison de Force.
5. We could also mention Georg M. Obermaier who implemented a system based on work very similar to that of Montesinos at the Kaiserslautern institution in Bavaria.
6. Cf. Drapkin, O. (1968, pp. 315-346).
7. Maconochie applied this system on an experimental basis without any legal justification. Appearing before a Committee in 1850, he pleaded in favour of a fixed sentence in terms of a task to be performed by the inmate.
8. The Irish system is often called the "intermediate system".
9. This original aspect of Crofton will be further examined in our section on parole.
10. A complete review of each of the American states is available in Attorney General's Survey, vol. 1, (1939).
11. Sol Rubin (1963, pp. 313-314) arrived at the same conclusion.
12. 31 Victoria, c. 75, art. 62 (1868).
13. 46 Victoria, c. 37, art. 53 (1883).
14. 6 Edward VII, c. 38, art. 62 (1906).
15. 9-10 Elizabeth II, c. 53, art. 22, 23 and 24 (1960-61).
16. 17-18 Elizabeth II, c. 38, art. 107 and 108 (1968-69).
17. Appearing before the parliamentary commission (justice and legal matters) on April 30, 1974, Commissioner M. Faguy based his estimates on 50% of the maximum security institutions and, seemingly, on all the medium security institutions.
18. The data on Quebec institutions refers to the year ending March 31, 1974. We have only reported the data which was used in the calculation of the percentages quoted in this paper, which covers four institutions.

Institution by type of security	Total population	Forfeiture of remission (number of inmates)	
		earned	statutory
maximum	391	172	0
medium	428	238	6
medium	499	180	84
minimum	125	10	25
Total	1,443	600* (50)	115

* To be calculated on a monthly basis, giving a total of 50 inmates per month.

N.B.—When forfeiture of remission is calculated in relation to the total population of all the institutions shown in the table, we obtain the following percentages:

earned remission—3.4%
statutory remission—7.9%

19. Indeed, in case of escape, article 22, para. 4 of the Penitentiary Act provides for the forfeiture of three-quarters of the statutory remission standing to credit at the time the offence is committed.
20. The Canadian Criminology and Corrections Association recommended the withdrawal of remission in a brief submitted to the Senate Committee on Parole in Canada (Jan. 1973, pp. 11-12). The Task Force on Release of Inmates Report, presided by Justice Hugessen, contains a similar recommendation (November, 1972, Chap. V, pp. 33-34). The report of the Senate Committee on Parole in Canada (March 1974, pp. 63-66) also recommends that the present provisions on remission be repealed.

Parole

1. DEFINITION

A group of experts gathered at a United Nations meeting in 1954 defined parole in general terms as a measure by which *selected* inmates may benefit, *before the expiry of their prison term*, from a release subject to *certain conditions*. After having been so released, paroled inmates *remain in the custody of the State or of any authority* designated by the State and may be reincarcerated for misconduct. Parole is a penal measure aimed at assisting offenders in their transition from the penitentiary regime of very strict supervision to freedom in society. It is neither an act of clemency nor a pardon.

This definition stresses four important elements of parole.

(A) First, it mentions that inmates are *selected*. Parole committees must consider who could be released and when they could be released. These two decisions may seem very related to one another, but they involve different considerations. Whereas parole committees at the very beginning were mostly preoccupied with releasing the inmates who were less likely to recidivate, increasing consideration is given today to the time of release. Indeed, on the one hand, an increasing number of inmates are released on parole¹ and on the other hand, another measure has been applied for the past few years here and there called *mandatory supervision* which subjects the inmates who have not been released on parole to the same terms and conditions as those who have been, for a period equal to the remission earned for good conduct or to the statutory remission.

(B) The second important element of the definition is that the inmates benefit from a release *before the expiry of their prison term*. Indeed, parole only arises at the end of a prison term and is merely a period of transition included in the sentence of imprisonment. Even though paroled inmates are subject to assistance, supervision and conditions that are similar to those of offenders on probation, the

two measures are very different. Probation is a measure imposed by the court but does not involve imprisonment for the convicted person². It is very often applied in substitution for imprisonment. On the other hand, parole is always granted after a certain period of imprisonment.

(C) The third element of parole is that the release is *subject to certain conditions*. All paroled inmates are subject to certain general conditions. In Canada, the parole certificate mentions seven such conditions. Among other things, paroled inmates must, in addition to abiding by the law, remain under the authority of a representative designated by the Board, report to the police once a month and remain within a designated territory. Furthermore, the Parole Board may impose all other conditions it may deem necessary, such as forbid the consumption of alcohol or forbid paroled inmates from visiting public bars or known criminal hangouts. The violation of such rules can result in reincarceration.

(D) The fourth characteristic specifies that the paroled inmates remain *in the custody of the State*. Even though this part of the definition refers mostly to the notion of supervision, it later mentions that the purpose of parole is to *assist* offenders. The two important notions of *supervision and assistance* are therefore included in this definition.

Historically, the control or supervision aspect of parole was of first importance. Today, however, the assistance aspect is just as important.

This definition does not make any mention of a fifth aspect emphasized by Hawkins (1971, p.6): which authority makes the *decision*? He points out that the decision on release is made by the Executive or by administrative bodies in parole systems of the American type. However, in many European and South American countries whose judicial systems have been influenced by Roman Law, the execution of the sentence and of parole are judicially controlled (Planski, 1973)³. Although the North American parole is characterized by an administrative decision, such is not the case in all parole systems. It is therefore understandable that the U.N. experts did not deem it opportune to include the decision-making aspect in their definition.

2. ORIGIN

The idea of a period of transition between imprisonment and total freedom, during which an ex-inmate would be released subject to certain conditions was defined and systematized in Europe at the beginning of the XIXth century. In 1846 (Normandeau, 1972, p. 130), Bonneville de Marsangy, considered by Europeans as the father of parole, gave a speech on

“preliminary liberation”. In 1847, he explained his system in the “*Traité des diverses institutions complémentaires du régime pénitentiaire*”.

However, it is in Australia that the concept of conditional liberation was first applied. Indeed, in 1787, the British began to transport their convicts to Australia and in 1790 (Hawkins, 1971, p. 17), the Governor or Lieutenant Governors of the penal colonies were officially authorized to terminate the sentence of inmates, with or without conditions. One of these forms of pardon subject to conditions, called “*ticket-of-leave*”, discharged the inmate of his obligation to work for the government and allowed him to establish himself in a specific area provided he maintained himself and did not commit any offences. Although the “*ticket-of-leave*” was first conceived as an incentive to work and behave, it was progressively granted more liberally. A report written in 1822⁴ leads us to believe that the granting of a “*ticket-of-leave*” was considered as a right and no longer as a reward.

Then, in 1839, Captain Alexander Maconochie⁵ was placed in charge of the *Norfolk Island* penal colony near the shores of Australia. During the four years he held this position, Maconochie implemented a progressive system by which an inmate could earn a certain number of points to progress to the next stage and finally obtain his “*ticket-of-leave*”, as an alternative to serving a term in the penal colony. This “Mark System” according to which the length of incarceration depended on the inmate’s work and good conduct, made him responsible for his own destiny.

This indeterminate sentence experiment, which later had a tremendous impact on the development of penology, ended with a “*ticket-of-leave*” stage. However, as we have just indicated, this “*ticket-of-leave*” already existed in Australia before Maconochie’s arrival and he did not attach much importance to it.

It is in Ireland that the “*ticket-of-leave*” became an essential stage of the progressive system and that it really became the foundation of parole as we know it today.

Indeed, Sir Walter Crofton was appointed director of Irish prisons in 1854. He applied Maconochie’s *Mark System* placing emphasis on the period of transition and on the *ticket-of-leave* which had been introduced in England and Ireland by the *Penal Servitude Act*⁶ of 1853. During the first stage of the system implemented in Ireland, the inmates had to serve a prison term of 9 to 10 months in their cells. The second stage of the sentence consisted of collective work under strict discipline. This stage was divided into four periods through which the inmate had to progress by earning a certain number of points (Marks) by his work, discipline and learning performance. Then, the inmates deemed to have been sufficiently rehabilitated were sent to minimum security intermediate prisons⁷. Fi-

nally, the inmates could be granted a parole.

The *ticket-of-leave*, as applied by Crofton in Ireland, has been considered as the first true parole experiment because it was preceded by a strict selection procedure and was accompanied by assistance and supervision. Indeed, Bonneville de Marsangy indicated that the conditions relative to the revocation of licences were more specific and more strict in Ireland than in England and that they were always executed with punctuality (1864, p. 140). Furthermore, Hawkins (1971, p. 31) points out that parole officers in Dublin provided assistance to ex-inmates by helping them to find employment, for example, in addition to exercising their supervision.

Thanks to the dynamism and personality of Sir Walter Crofton, the progressive system (often called Irish system), indeterminate sentence and parole had a strong impact on modern penology. However, it was Reverend E. C. Wines, secretary of the *New York Prison Association*, who contributed the most to the promotion of these ideas in the United States. An expert on the position of penology in Europe, Wines wrote a number of articles on the principal European reformers, between 1860 and 1870, and published their papers in the annual reports of the Association. He translated the speech on parole given by Bonneville de Marsangy in 1846 in the 23rd annual report of 1867 (Hawkins, 1971, p. 35). He was also the principal organizer of the famous *Congress on Penitentiary and Reformatory Discipline* held in Cincinnati in 1870⁸, a congress in which the following personalities were active participants: Sir Walter Crofton, Matthew Davenport Hill, an enthusiastic supporter of indeterminate sentences who had been a close friend of Maconochie in Birmingham⁹, as well as Z. R. Brockway, the first director of *Elmira*. Wines and Crofton were also the principal organizers of the *International Penitentiary Congress* held in London in 1872.

All these discussions resulted in the opening of the Elmira Reformatory in the State of New York in 1876. Its first director, Z. R. Brockway applied a progressive system almost identical to Crofton's, with the exception that the law did not provide for true indeterminate sentences. The first parole system similar to those applied today was applied for the first time in North America at Elmira.

Parole was accepted quickly in the United States, much more quickly than the indeterminate sentence and independently of it. It was first applied in reformatories and then in the prisons and penitentiaries. In 1900, twenty states (Lindsey, 1925, pp. 30-40) had adopted a parole system.

3. EVOLUTION IN CANADA

The Statute of 1899

Although the parole system was widely applied in the United States during the last quarter of the XIXth century, our Canadian Ticket of Leave Act entitled "An Act to Provide for the Conditional Liberation of Convicts"¹⁰ was inspired by a British law¹¹. In fact, as the Prime Minister stated in introducing the Bill in the House of Commons: "The Bill follows, I believe, word for word, the English Act. That Act has been in operation in England for some twenty years and more, perhaps, and I understand, has worked satisfactorily." (Fauteux, 1956, p. 55).

The Prime Minister should have said "for some *forty* years and more" because the Canadian law adopted in 1899 was copied word for word from the English *Penal Servitude Act* of 1853¹² and its amendments of 1864¹³ and 1871¹⁴. The Fauteux Committee justifiably commented in 1956:

The archaic character of the Act is indicated, to some extent, by the language of some of the statutory conditions which are attached to each licence (p. 56).

since these conditions had been copied word for word from the English Act of 1864.

The general structure of the 1899 statute is as follows:

The Governor General, acting on the advice of the appropriate Minister of the Crown (now the Solicitor General of Canada), may grant to any person under sentence of imprisonment in a penal institution for an offence against the criminal law of Canada, a licence to be at large in Canada during such portion of his term of imprisonment and upon such conditions as may be indicated in the licence. The licence may, from time to time, be revoked or altered. The sentence of imprisonment is deemed to continue in operation even though the licensee is at large. That is to say, the licensee serves the balance of his term of imprisonment by satisfying the conditions of the licence. The licence may contain any conditions that the Governor General, on the advice of the appropriate Minister, sees fit to apply to the licensee. If the licensee is convicted of any indictable offence, the licence is forthwith forfeited by operation of law and the licensee must return to the institution to serve the balance of his sentence that remained unexpired when the licence was granted. If the licensee is convicted of a summary conviction offence or in any way fails to abide by the conditions under which the licence was issued, it may be revoked by the Governor General, again on the advice of the appropriate Minister, and thereupon the licensee is to be returned to the institution to serve the balance of his sentence that remained unexpired when the licence was granted. The licensee is required to notify the local police authorities of his place of residence and of any intentions that he may have of changing his place of residence. Male licence holders are required to report to the police authorities once each month. Female licensees are not required to report. A licensee is required to carry his licence with him and to produce it when required to do so by a judicial officer or a peace offi-

cer. Any peace officer is entitled to arrest, without a warrant, any licensee whom he reasonably suspects of having committed any offence or who, it appears, is getting his livelihood by dishonest means.

(Fauteux, 1956, pp. 55-56).

At the beginning of the century, the task of preparing the files for the Minister of Justice who advised the Governor General was entrusted to officers of the Department of Justice as part of their ordinary duties. In 1913, this task was assigned to a new section of the Department designated as the Remissions Branch. It seems that this Branch only had one parole officer until 1931 (Fauteux, 1956, p. 8). His duties involved visits to penal institutions, interviews with inmates and generally some investigation of the case of every inmate who applied for parole. After his investigation was concluded, he submitted a report to the Chief of the Remission Service who submitted it to the Minister after having completed it.

In 1938, "the Chief of the Remissions Branch . . . had as assistants three officers seconded from the Royal Canadian Mounted Police".

(Archambault, 1938, p. 236.)

Until 1949, the officers of the Remission Service were all stationed in Ottawa. They visited each penitentiary and the large provincial prisons once each year for the purpose of interviewing inmates who had applied for parole. In 1949, the Service established two regional offices, in Vancouver and Montreal. The Service did not expand any further until 1955. The central administration in Ottawa only employed seven officers. (Fauteux, 1956, p. 8.)

In addition to being administered by an insufficient number of officers, the 1899 statute was the subject of much criticism, most of which was made or summarized in the "Report of the Royal Commission to Investigate the Penal System of Canada" (Archambault, 1938).

The legal provisions stipulate that the Governor General acts upon the advice of the Minister of Justice who himself is informed by officers of his Remissions Branch. However, the members of the Archambault Commission deplore the fact that:

The Branch does not attempt to compile case histories of the applicants in the ordinary sense of the term. The information that is acted upon is very meagre, and is gathered from three main sources:

1. A species of questionnaire completed by the prison officials;
2. Reports from the sentencing judge or magistrate;
3. Letters and representations received on behalf of the prisoner from those in no way connected with the administration of justice. These too often appear to ema-

nate from those purporting to have political influence. There is no pretence at any organized inquiry into the social background of the prisoner or the conditions to which he will return if released". (p. 237).

A. E. Maloney (1949, p. 1076) made the same observations ten years later.

The commissioners then strongly criticized the "rules of general application" (or the criteria) which govern the practice of the Remissions Branch with respect to applications for parole. Stating that the purpose of the Act is to provide that prisoners who have served part of their sentence may have an opportunity to serve the remainder of it under licence at large, they are of the opinion that the *clemency features* mentioned in the memorandum (submitted by the Chief of the Remissions Branch) are not features which ought to be allowed to override the purposes of the Act (p. 239). The Fauteux Committee (1956) unfortunately observed 20 years later in a chapter devoted to these rules that:

Subject to certain modifications made to them, in order to give effect to a number of the recommendations of the Archambault Commission in 1938, these rules are in many respects the same as they were at the time . . . (p. 62).

The Archambault Commission continued its criticism of the criteria by denouncing pressures made on the officers: "Your Commissioners are of the opinion that in the past officers of the Remissions Branch have listened to, and in some cases acted upon, representations which were not founded on sound principles. Undoubtedly, members of Parliament and those in positions to influence have had too much attention from the officers of the Remissions Branch" (p. 240). Maloney (1949) observed that "political influence carries an improper amount of weight and there is a shocking lack of uniformity in granting licences under the Ticket of Leave Act" (p. 1081).

However, the strongest criticism made with respect to the application of the act is that it was considered as a measure of clemency or "conditional pardon" (Jobson, 1966, p. 60) rather than as a conditional measure which facilitates social reentry. The memorandum submitted by M. F. Gallagher, Chief of the Remissions Branch, to the Archambault Commission was very explicit in this respect¹⁵. This conception seems to have persisted, at least in practice, until 1956: "The investigation procedure of the Service, however, in the main still reflects the traditional view that a Ticket of Leave is in the nature of an exercise of clemency . . ." (Fauteux, 1956, p. 66).

Finally, the members of the Royal Commission of 1938 made some recommendations with respect to ticket-of-leave and parole:

- The Ticket-of-Leave Act should be amended to give effect to the recommendations contained in this report.

- The Remissions Branch should be abolished, and the services now performed by it should be transferred to the Prison Commission, which will act as a central parole board.
- A parole officer should be appointed by the Prison Commission in each province or group of provinces, according to population, to investigate applications for parole and make recommendations to the Prison Commission.
- The administration of the Ticket-of-Leave Act should be definitely and completely removed from any suggestion of political interference. (p. 360).

Unfortunately, except for a few modifications made to the conditions regarding the selection of cases, "it is right to say that effect has not been given to any of the recommendations of the Commission on ticket-of-leave and parole" (Maloney, 1949, p. 1089)(?)

The Fauteux Committee

The appointment in 1953 of a Committee to inquire into the principles and procedures followed in the Remission Service of the Department of Justice of Canada (Fauteux, 1956) by the Minister of Justice was an important step in the development of parole in Canada. Indeed, the report of this Committee submitted in 1956 resulted in the proclamation of the Parole Act in 1959.

The Committee accepted the concept of parole defined by a group of UN experts (1954) and separated it completely from the notion of clemency. "Parole should be an integral part of the whole correctional process. Indeed, the entire system of prison treatment should, from the beginning, be directed toward the probability that parole will constitute the last phase of the sentence of imprisonment" (p. 53). The Committee therefore recommended the creation of a Parole Board (chap. 11).

The Report was very well received by all parties at the House of Commons and the Act was adopted without opposition. The Act provided for the creation of a *Parole Board* composed of three to five members appointed by the Governor in Council for a maximum period of ten years. It also provided for the powers of this Board which consist of decisional powers with respect to the granting of parole and with respect to the suspension and revocation of parole certificates.

The Act also provided for the creation of a Parole Service, as recommended by the Fauteux Committee (1956, p. 83), however, its provisions in this respect are not extensive. The duties of this Service involve the collection and classification of the information required by the Board to make a decision in each particular case. The supervision of parolees is also provided by the Service with the assistance of other agencies.

The Parole Act and regulations were not the subject of any major amendments until 1969¹⁶.

That year, however, acting upon the recommendations of the "Canadian Committee on Corrections" (Ouimet, 1969, ch. 18) presided by Justice Roger Ouimet, the Government of Canada introduced several important amendments to the Parole Act in the 1968-1969 Act to amend the Criminal Code (Omnibus Bill).

This Act which came into force August 21, 1969, gave effect to many of the recommendations made by the Ouimet Committee, such as:

(1) *To increase the number of Board members*

The number of Board members was increased from five to nine.

(2) *To establish divisions of the Board*

These divisions composed of two members (Ouimet had recommended three members) may exercise all the powers conferred on the Board by this Act. Although the Board was not required by law to grant personal interviews to the inmates when deciding on the granting or revocation of parole, in practice, the inmates were visited by these panels in the penitentiaries¹⁷, which listened to their explanations and made on-the-spot decisions on the granting of parole whenever possible.

(3) *To establish a correctional system of mandatory supervision*¹⁸

This is a new provision of the Parole Act which applies to the inmates who have been sentenced or transferred to federal institutions after August 1, 1970 and who have not been granted parole. It is stipulated that these inmates shall be subject to supervision under the authority of the Parole Board for the entire period of statutory and earned remission standing to their credit when such credit amounts to 60 or more days. Inmates subject to mandatory supervision are subject to the same conditions as paroled inmates with respect to the suspension, revocation and forfeiture of parole.

This new provision is based on the opinion that if inmates eligible for parole need guidance and supervision, those not eligible for parole have an even greater need for it. The Parole Board provides the same support, consultation and assistance to inmates released under mandatory supervision as to paroled inmates.

4. TERMINATION OF PAROLE

The new Act increased the authority of the Parole Board¹⁹ by permitting it to grant discharge from parole in special cases except in the case of inmates sentenced to death or life imprisonment as a minimum sentence. According to the Ouimet Committee, termination would apply to paroled inmates with preventive detention or life imprisonment sentences.

The 1968-69 statute (c. 38) also provided for day parole²⁰, a measure which had not been explicitly recommended by the Ouimet Committee. It stipulates that an inmate may be released in the morning, and required to return to the institution at night or for several days returning to the prison on weekends or by other special arrangements. Although the law designates this measure as "Day Parole", this type of release may take various forms and may be granted for various durations, one day, one week or more. The expression "temporary parole" used by T. G. Street (1971, p. 48), former president of the Board, is probably more appropriate.

This type of parole is employed for two main purposes:

1. It can serve to allow continuity of employment or education, where disproportionately serious consequences would result, such as loss of long-term employment, or loss of a year of studies through inability to complete a term or write examinations.
2. Temporary parole is also used as a preconditioning for full parole²¹, and is frequently employed to test an inmate's ability to function in society and assist his re-integration by employment, attendance at retraining courses, etc. . . ." (Street, 1971, p. 46).

It could be argued, however, that whereas the second application consists of semi-release and thus corresponds perfectly with the purpose of the measure, the first is similar to semi-detention, when the Parole Board grants a parole at the very beginning of a sentence, and should thus fall under judicial competence.

In 1971 and 1972, the Canadian parole system was again the subject of study. On October 1971, the Senate passed the following motion: "That the Standing Senate Committee on Legal and Constitutional Affairs be authorized to examine and report upon all aspects of the parole system in Canada".

In June 1972, the Honourable Jean-Pierre Goyer, Solicitor General, appointed a task force, presided by Justice J. K. Hugessen, to examine the organization and methods applied with respect to the release of inmates prior to the expiration of their sentence with emphasis on certain specific points.

The Hugessen Task Force

This task force report, known as the Hugessen Report, was made public during the summer of 1973. It emphasizes two main points: the decentralization or regionalization of the Parole Board, and the rights of paroled inmates.

According to the members of this task force, decentralization, as recommended by several organizations which submitted briefs to the Senate, should be made at the local and regional levels. At the local level, a board composed of three members representing the Parole Service, the penitentiary institution and the population would have exclusive competence over certain categories of inmates. At the second level, regional boards in the five regions of Canada would have competence to make decisions on release, other than those which fall within the competence of the local boards. The regional board could nevertheless coordinate the activities of the local boards. At the third level, the National Parole Board and the Parole Institute would coordinate the activities of the various boards and ensure the uniformity of policy throughout the country.

The report recommends that greater consideration should be given to the rights of inmates and that present discretionary powers be limited. It also recommends the application of a "Due Process of Law" at several stages of the decision-making process. Thus, the decision to grant or revoke a parole would be made following an interview with the inmate concerned. The latter could be represented by a person of his choice. Most of the documents used in making the decision would be made available to him for consultation. The report also recommends that the terms and conditions of the parole certificate be specific and that its revocation be based on tangible facts.

Some of the Committee's recommendations have already been acted upon, for example:

1. In April 1974, the first step towards the regionalization of the Parole Board was made by the appointment of ten new commissioners who are to form regional boards composed of two members in each of the five regions of Canada.
2. Since then, the Board has decided to set forth specific administrative rules regarding suspension stating among other things, that the revocation procedure will be initiated by a written notice given to the inmate.
3. On June 1, 1973, the Solicitor General informed the House that, in the future, the decision to grant temporary leaves, other than those granted for humanitarian or medical reasons, would be made by the Parole Board and that the Canadian Penitentiary Service would no longer grant back-to-back temporary leaves.

4. Furthermore, it was agreed at the federal provincial conference on the correctional process held in Ottawa in December 1973, that the provinces would be allowed to set up parole systems for inmates of provincial institutions.
5. Finally, in accordance with recommendation no. 38 of the Committee, the Criminal Code was amended in 1973 to abolish the obligation to obtain the concurrence of the Governor in Council with respect to the decision to grant parole to murderers.

However, these amendments create an unfortunate precedent. The judge presiding over the trial of an accused convicted of murder is thus permitted to sentence him to a compulsory prison term before becoming eligible for parole²².

The Goldenberg Committee

The Senate Committee Report is based mainly on a consultation process. The Committee received over one hundred briefs and held 26 public hearings between December 1971 and June 1973 which involved approximately 75 witnesses. It submitted its report in March 1974 which was published in the fall of the same year. The Committee adopted a concept of parole similar to that of the Ouimet Committee. Parole is one *step* in the correctional process. "All incarcerated offenders should plan their release on parole with institutional and parole staff" (p. 42).

Like the Hugessen Task Force, the Committee advocates a decentralized parole system (chapter V). Such decentralization explained in recommendations 8 to 21 first implies that "the authority to parole inmates sentenced to imprisonment in provincial institutions should be transferred to provincial governments" (recommendation no. 10) and that "the federal parole authority should consist of a Headquarters Division and Regional Divisions corresponding to Canadian Penitentiary Service Regions, all to constitute one board" (recommendation no. 11). The Committee considers however "that the Regional Division should have full parole jurisdiction for all cases within its region" (p. 68).

Its recommendations to establish rules governing parole application hearings, suspension, revocation and forfeiture procedures (recommendations 35 to 40, 59 to 65) are similar to those of the Hugessen Report. They all reflect the concern of many correctional theoreticians and practitioners to establish formal rules that meet standards of fairness.

We also point out that recommendation no. 6 according to which statutory and earned remission should be abolished was examined in the first chapter of this paper. We also agree with recommendation no. 41 of the Committee, that "... the last third of every definite term of imprisonment should be a period of minimum parole to which the inmate is entitled".

Finally, in our opinion, recommendations 71 to 74 of chapter XI of the Goldenberg Committee Report, entitled "Special Cases", which advocate indeterminate sentences for dangerous offenders, seem to contradict the theories and data submitted in the study paper on "dangerous offenders" published by the Law Reform Commission of Canada. They are also in complete contradiction with the stated position of the Commission in its working paper on imprisonment.

5. CONCEPTS OF PAROLE

The concept of parole has developed through the years but there are still discussions today between:

- (A) Those who consider it to be a measure of *clemency*;
- (B) Those who consider it to be a *selective penological measure* granted to those inmates who have demonstrated their desire to reform. They generally believe that parole is an effective means of reducing recidivism; and
- (C) Those who believe that parole should be considered as a period of transition included in all prison sentences and which should be automatically granted to all inmates without requiring them to apply for it.

(A) *A Measure of Clemency*

This concept prevailed in Canada during the application of the 1899 law until its repeal in 1959. As we mentioned earlier, parole was a *measure of clemency* which was granted in exceptional cases to occasional offenders, to young inmates who had been influenced by "evil companions", to older inmates, to inmates in poor health, to those who gave assistance to the government and even in cases of "improbability of guilt". This concept is unfortunately still accepted by a large proportion of the population but is hardly upheld by those involved in the administration of justice.

(B) *A Selective Measure*

This concept considers that parole is a penological measure which must only be applied to those inmates who have demonstrated their desire to reform or who are very likely to reform and who do not present any threat to the community. This is a *selective measure*; authorities must determine *who* should be released. At the time of W. Crofton and Bonnevillle de Marsangy, parole amounted in practice to the issuing of a certificate of good conduct since the inmates could only obtain it by successfully passing through all the stages of the progressive system, including the period of preliminary release (day parole). The members of

the Fauteux Committee subscribed entirely to the views expressed in the Archambault Report, according to which parole should only be granted to those who intend to mend their ways and who are likely to succeed²³.

This concept, which prevailed until lately²⁴, rests on two assumptions:

- (1) That the Parole Board is effectively able to select the right candidates, and
- (2) That parole is an effective means of reducing recidivism.

See Tables 1 and 2, pages 120 and 121.

These assumptions unfortunately do not resist analysis. First, as demonstrated by Tables 1 and 2, parole was obviously a highly selective measure in Canada from 1959 to 1971. Indeed, (Table 1) from 1961 to 1967, approximately only two thirds of penitentiary inmates who were eligible for parole applied for it. However, this percentage increased from 71% to 89% from 1968 to 1971. Moreover, the Parole Board had granted less than 50% of these applications prior to 1969, the year when the percentage of applications granted rose to approximately 60%. In fact, less than one third of the inmates eligible for parole were generally granted such a release. In 1968, for example, 1,331 paroles were granted from a total of 4,455 eligible inmates, that is less than 30%. The percentage of applications granted also began to increase considerably during 1969 in provincial institutions. On the whole, less than half from 1959 to 1968, and approximately two thirds of inmates from 1969 to 1971, who *applied* for parole were granted such a release. We must point out, however, that they only represented approximately one third of the inmates who could have been released on parole.

Table 2 provides additional information on the selection of inmates by indicating the manner in which penitentiary inmates were actually released from 1959-60 to 1969-70. Even though the figures may not be compared to the previous table because they were calculated on a different annual basis, we can nevertheless observe the effect of selection. Thus, we notice that more than one third of the penitentiary inmates were released by parole during only four of these eleven years, whereas less than one quarter of the inmates were released in this manner between 1962 and 1965.

However,

- (1) *Is parole really effective in reducing recidivism?*
- (2) *Can the commissioners effectively select the best candidates, those who want to and are able to mend their ways?*

(1) There are very few studies available in Canada on the first question. Two studies (Langlois, 1972 and Waller, 1974) compare the recidivism rate of inmates released on parole and upon expiration of

their sentences. According to these two studies, it seems at first that the inmates released at the end of their sentences have a higher recidivism rate than those released on parole.

According to Table 3, 27.5% of paroled inmates and 53.1% of inmates released at the end of their sentences were convicted of a new offence during the first two years following their release from four Quebec penitentiaries from 1960 to 1962²⁵. This gap of approximately 20% between the two methods of release is still present after a test period of five and ten years.

See Tables 3 and 4, pages 122 and 123.

The recidivism rates of Tables 3 and 4 cannot be compared because the samples differ in time (1961–1968) and place (Quebec-Ontario) and the criteria of recidivism also differ²⁶. There is also a great difference in Waller's study between the recidivism rate of inmates released at the end of their sentences (68% in 2 years) and inmates released on parole (44% in 2 years). However, the higher success rate of paroled inmates must not necessarily be attributed to the release measure itself. Indeed, there is a great difference between the inmates released on parole and those released upon expiration of their sentences. Among other things, the first have a better record, are usually married and are more educated (Waller, 1974, p. 47)²⁷. They also differ by their adaptation to the penitentiary.

These are really the differences which affect the rate of success. When the effect of these variables is controlled, there is no great difference between the recidivism rates of persons of homogeneous background in relation to the method of release. In other words, people with similar characteristics do not have a lower recidivism rate if they are released on parole rather than at the end of their sentences. Waller's study (1974)²⁸ is very conclusive in this respect. The Canadian data provided by Landreville (1967, p. 304) suggested similar conclusions although subject to further interpretation. They, however, merely confirmed the conclusions of several American studies²⁹.

(2) However, since the inmates released before the end of their sentences are better candidates than the others, is it possible to verify the assumption that the parole commissioners are able to make an effective selection?

Waller (1974) believes that such verification is impossible. It is the inmates themselves, and not the commissioners, who are able to effectively predict who will succeed after release. Indeed, the two variables, "mode of release" and "application for parole", were very much related to re-arrest within six and twelve months following re-

lease, whereas the variable "granting of parole" was not³⁰. Waller also observed that the inmates who did not apply for parole were often those with a bad record who do not find employment after release, who do not have a family and who easily get into trouble under the influence of alcohol and that all these variables figured among those strongly related to re-arrest. This data led him to the conclusion that the apparent success of parole is mostly due to the "natural selection" made by the inmates who do not apply for parole and not to the "selection" made by the National Parole Board.

C. *A Period of Transition*

Finally, a third conception of parole was formed in Canada a few years ago. The recommendations of the Ouimet Committee (1969) clearly emphasized this third concept as a *period of transition* to which all inmates should be subject. Like the members of the American Katzenbach Commission, the members of the Ouimet Committee proposed the adoption of a system called Statutory Conditional Release to which all penitentiary inmates who are not released on parole should be subject. They merely distinguished these two methods of release for "political" reasons³¹. In fact, since the coming into force of this measure, the Parole Board no longer has to decide *who* should be released on parole but *when* an inmate should be paroled.

However, is the Parole Board better able to determine *when* an inmate should be released than it was to determine *who* should be released? The decision being more delicate and based on indefinite criteria, there is nothing to support a positive answer in this regard. It would probably be more advantageous and economical to predetermine the time of release after a specific portion of the prison sentence has been served without any intervention by a selection committee except in special cases.

Indeed, we believe that parole should not be dismissed under the pretext that it has not proven to be more successful than imprisonment in reducing recidivism. Even though parole was not able to attain this objective, it remains a more humane and economical measure than imprisonment.

Furthermore, many offenders sentenced to prison have social adaptation problems which, in our opinion, can be better dealt with when they are at large than in a prison environment. Waller (1974) indicated that the problems most highly related to recidivism are working problems, drinking problems and family problems. Practicians have also observed that a number of released inmates encounter problems of this type. It is therefore logical to believe that offenders could be helped more effectively by attacking these problems in a more aggressive and imaginative manner in

an open environment than during their stay in prison.³²

We should also mention that many offenders presently incarcerated do not need this kind of assistance and that even if the prison population were reduced substantially, there would still be a number of ex-inmates who would not need assistance and supervision. However, it would be unfair to release these individuals unconditionally before the expiration of their sentence and this is why we recommend that parole, accompanied by assistance and supervision, be conceived as a period of transition included in sentences of imprisonment and that all inmates be subject to it as a rule after having served part of their prison terms.

TABLE I
Propensity to Apply For and Grant Parole
in Canada Since its Implementation (1959-1971)

Year	1959	1960	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971
FEDERAL													
% of eligible applications granted during the year	—	85%	64%	64%	57%	56%	61%	68%	66%	71%	75%	83%	89%
% of applications granted	994	1,192	1,005	885	663	751	1,127	1,114	1,328	1,331	2,030	2,852	2,785
	44%	34%	35%	32%	26%	29%	37%	41%	47%	42%	62%	64%	61%
PROVINCIAL													
Applications granted during the year	1,044	1,333	1,292	987	1,126	1,101	1,170	1,382	1,760	2,187	3,062	2,081	3,493
% of applications granted	41%	51%	32%	30%	31%	29%	31%	39%	46%	54%	70%	74%	71%
TOTAL													
Applications granted during the year	2,038	2,525	2,297	1,872	1,789	1,852	2,297	2,496	3,088	3,518	5,092	5,923	6,278
% of applications granted	42%	41%	33%	31%	29%	29%	34%	40%	46%	49%	66%	69%	66%

Huggessen, 1973, p. 73

TABLE 2
Release of Male Penitentiary Inmates
According to the Mode of Release (1959 to 1970)

Year	Total inmates released	Released upon expiration of sentence		Released by parole		Other mode of release	
		Number	%	Number	%	Number	%
1959-60	3,290	1,846	56.10	985	29.23	459	13.95
1960-61	2,871	1,714	59.70	1,031	35.91	126	4.38
1961-62	2,915	2,008	68.88	837	28.71	70	2.40
1962-63	3,594	2,739	76.21	786	21.86	69	1.91
1963-64	3,391	2,799	82.54	735	15.77	57	1.68
1964-65	3,739	2,902	77.61	786	21.29	41	1.09
1965-66	3,598	2,594	72.10	950	26.40	54	1.50
1966-67	3,661	2,525	69.00	1,055	28.82	81	2.21
1967-68	3,571	2,180	61.04	1,328	37.18	63	1.76
1968-69	3,646	2,119	58.11	1,466	40.21	61	1.67
1969-70	3,950	1,896	48.00	1,947	49.29	107	2.70

Ciale, 1972, p. 42

TABLE 3

Recidivism rate of inmates released from
penitentiaries in the Quebec region during 1960-61-62

Test period	No. Rec.	Expiration of sentence		No. Rec.	Parole		No. Rec.	Total % cum.
		% rel.	% cum.		% rel.	% cum.		
1/3 months	97	10.5	10.5	25	3.4	3.4		
4/6 months	108	11.6	22.1	29	4.0	7.4		
7/9 months	88	9.5	31.6	37	5.0	12.4		
10/12 months	67	7.2	38.8	26	3.5	15.9	477	28.6
13/15 months	52	5.6	44.4	18	2.5	18.4		
16/18 months	31	3.3	47.7	25	3.4	21.8		
19/21 months	29	3.1	50.8	16	2.2	24.0		
22/24 months	21	2.3	53.1	26	3.5	27.5	695	41.7
3 years	72	7.8	60.9	59	8.0	35.5		
4 years	43	4.6	65.5	49	6.7	42.2		
5 years	29	3.1	68.6	27	3.7	45.9	984	58.0
6 years	17	1.8	70.4	14	1.9	47.8		
7 years	15	1.6	72.0	13	1.8	49.6		
8 years	9	1.0	73.0	17	2.3	51.9		
9 years	7	.8	73.8	9	1.2	53.1		
10 years	5	.5	74.3	8	1.1	54.2	10.88	65.0
	690	100		398	100			

Langlois, 1972, p. 20

TABLE 4
 Recidivism Rate from a Sample
 of Inmates Released from
 Ontario Penitentiaries in 1968

	Mode of Release					
	Expiration of sentence		Parole		Total	
	No.	%	No.	%	No.	%
Success						
(2 years)	69	32	117	56	186	44%
Failure						
(2 years)	144	68	93	44	237	56%
TOTAL	213	100	210	100	423	

Waller, 1974

References (Parole)

1. Several American states use this method to release over 80% of their inmates. Cf. Katzenbach (1967), *Correction*, p. 61.
2. We point out that, in Canada, section 663(1)b of the Criminal Code permits the court to direct that the accused comply with the conditions prescribed in a probation order in addition to sentencing him to imprisonment for a term not exceeding two years. This type of sentence has been the subject of much criticism by the Ouimet Committee (1969) among others.
3. Cf. also: Lindsey 1975, Hawkins 1971.
4. "Report of the Commission of inquiry into the state of the colony of New South Wales" (J. T. Bigge), *Parl. Papers*, 1822, Vol. 20, p. 645,—cited by Hawkins, 1971, p. 19.
5. Cf. Barry (1958).
6. 16-17 Victoria c. 99 (1853). Cf. Du Cane (1885) Ch. 6.
7. Bonneville de Marsangy had already recommended this kind of "preliminary release" in 1847. In 1864, he wrote (p. 132) that the point system or any other similar method or classification could allow us to presume that the inmates had reformed but it did not constitute sufficient proof. To obtain more positive proof, a kind of penitentiary test should be devised to determine whether or not the inmates have sufficiently reformed to benefit from a period of preliminary release. Crofton was also of this opinion.
8. Cf. Wines, E. C. (ed.) (1871).
9. Cf. Barry (1958) p. 187. Barry also emphasizes (p. 231) the close similarity between the declaration of principles made at the Cincinnati Congress (basic principles of the *American Prison Association*) and the writings of Maconochie.
10. S. C. 1899, c. 49.
11. Probably to avoid "americanizing" our law as the first parole officer of the Dominion, Brigadier Archibal, put it in 1907.
12. This is apparent by comparison of two paragraphs from these laws:

(a) It shall be lawful for Her Majesty, by an Order in Writing under the Hand and seal Her Majesty's Principal Secretaries of State, to grant to any Convict now under Sentence of Transportation, or who may hereafter be sentenced to Transportation, or to any Punishment substituted for Transportation by this Act, a Licence to be at large in the United Kingdom and the Channel Islands, or in such Part thereof respectively as in such Licence shall be expressed, during such Portion of his or her Term of Transportation or Imprisonment, and upon such Conditions in all respects as to Her Majesty shall seem fit; and it shall be lawful for Her Majesty to revoke or alter such Licence by a like Order at Her Majesty's Pleasure.

16-17 Victoria, C. IX (1853)

It shall be lawful for the Governor General by an order in writing under the hand

and seal of the Secretary of State to grant to any convict under sentence of imprisonment in a *penitentiary* a licence to be at large in Canada, or in such part thereof as in such licence shall be mentioned, during such portion of his term of imprisonment, and upon such conditions in all respects as to the Governor General may seem fit; and the Governor General may from time to time revoke or alter such licence by a like order in writing.

S. C. (1899) C. 49. S. 1.

(b) So long as such Licence shall continue in force and unrevoked, such Convict shall not be liable to be imprisoned or transported by reason of his or her Sentence, but shall be allowed to go and remain at large according to the Term of such Licence.

16-17 Victoria, C. 99 S. X. (1855)

so long as such licence continues in force and unrevoked such convict shall not be liable to be imprisoned by reason of his sentence, but shall be allowed to go and remain at large according to the terms of such licence.

S. C. (1899) C. 49 S. 2

13. 27-28 Victoria C. 47 (1864).
14. 34-35 Victoria C. 112 (1871).
15. Cf. Archambault (1938), pp. 249-50.
16. S. C. (1958) c. 38.
17. This practice was abandoned during the spring of 1973 because it overburdened the commissioners' workload.
18. This measure had already existed for some time in the American federal system (Killinger, 1951, p. 364).

The President's Commission on Law Enforcement and Administration of Justice (Katzenbach, 1967, p. 166) had recommended its generalization in 1967.

19. The Ouimet Committee (1969, p. 348) had recommended that the Parole Act be amended to provide for termination of parole in appropriate cases but that termination be conferred upon a judge or magistrate whereas the law gave such authority to the Parole Board.
20. In this respect, see chapter 3 of our study.
21. Bonneville de Marsangy had already recommended this measure over one hundred years earlier (1847). "We could establish, between the state of absolute detention and preliminary release, an intermediate period which could be very helpful and which would consist of allowing only reformed inmates to work outside the institution with masters or individuals who would agree to employ them *during the day*. The inmates would be required to return to and sleep at the institution in the evening. . ." (1864, p. 132). Crofton applied this measure in Ireland in 1856.
22. According to section 218(6)(b) of the Criminal Code, the judge may substitute for the number of ten years which all inmates guilty of murder must serve before becoming eligible for parole, a number of years not more than twenty but more than ten.
23. "The predominant consideration must be:

Has the prisoner formed a fixed determination to forsake his former habits and associates and to live as a law-abiding citizen and will he be assisted in that determination by being allowed to serve the balance of his sentence under supervision and at large?"

(Fauteux, 1956, p. 64)

24. Mandatory supervision came into force in 1970 and so to speak imposed parole on all penitentiary inmates.
25. Unfortunately, a portion of the sample of inmates were released in 1959 before the coming into force of the new Parole Act (Cf. Ciale *et al.* 1967).
26. Langlois' study (1972) associates failure with a *new conviction* whereas Waller (1974) is more strict associating failure with *re-arrest*.
27. Langlois (1972, p. 9) finds that a much greater number of paroled inmates had a clean record; cf. also Léveillé 1970.
28. "We have looked at both prison and parole only to confirm the conclusions of other studies that they are ineffective in terms of reducing the likelihood of re-arrest". Waller, 1974, p. 192.
29. Cf. Waller, 1974, ch. 1.
30. "Our results suggest that if anyone has "divine insight" it is the inmate. Using the limited prediction model, we found, after accounting for expected probabilities of re-arrest, that the two variables, mode of release and application for parole, were very much related to re-arrest within six and twelve months although not twenty-four months. The variable concerned with the granting of parole, on the other hand, was not found to be related." (Waller, 1974, p. 189).
31. "... Some name for this program other than parole should be used so that there will be no confusion between the success rates of parole and the success rates of this new program". (Ouimet, 1969, p. 350).
32. Greater efficiency in this respect would probably not reduce recidivism by an appreciable amount but we are hopeful that it could at least put it off.

Day Parole and Temporary Absence

Day Parole and temporary absence are two measures used in Canada which interrupt, vary and sometimes terminate the period of imprisonment. Work outside the institution and social interaction in the community are two important elements in the application of these measures.

Let us examine their origin and review their application in the United States and Canada.

1. ORIGIN

These two rehabilitative measures which place emphasis on work and the community are derived from the development of the notion of prison labour and from the development of the theory of criminology by the discovery of the social causes of delinquency.

(A) *Prison Labour*

Hard labour sentences always inherently included a coercive aspect which took precedence over the productive aspect of the tasks assigned to the inmates. They were assigned work that was useful to the government but unpleasant and hard to perform and it seems that the number of convicts often corresponded to the manpower needed to exploit the mines, row the galleys or build the roads . . . Colbert's note to the members of the French Parliament is eloquent in this regard:

Le Roy m'a commandé de vous écrire ces lignes de sa part pour vous dire que, Sa Majesté désirant rétablir le corps de ses galères et en fortifier la chiourme par toutes sortes de moyens, son intention est que vous teniez la main à ce que vostre compagnie y condamne le plus grand nombre de coupables qu'il se pourra, et que l'on convertisse même la peine de mort en celle des galères (Cornil, 1968, p. 388).

The King has ordered me to write to you on his behalf to inform you of His Majesty's intention to restore the crew of his galleys and increase the number of galley slaves by all means and to urge you, at His Majesty's request, to convict the greatest number of delinquents as possible and to even convert the death penalty to a galley penalty.

(Cornil, 1968, p. 388).

[TRANSLATION]

Other tasks were imposed on the convicts which were sometimes completely useless and sordid and clearly demonstrated the purely punitive and coercive aspect of the original concept of prison labour. Here are three classical examples of such practices: the "water cellar" which required the prisoner to pump day and night to avoid drowning; the tread-wheel set into motion by the prisoner's weight who had to climb it unceasingly; the variable pressure winch which was set to revolve a certain number of times per day.

After the first prison experiments, the institutions slowly began to assign more productive tasks and trades were introduced as part of a system at the beginning of the XIXth century. From then on, work was considered as an essential part of the penitentiary system. Many attempts were made to include work in the penitentiary system, met by many difficulties which have always been only partially or temporarily resolved¹. Among such difficulties, we note the restrictions regarding disciplinary and security measures as well as the quality and stability of manpower. Other problems arose outside the system such as competition from free enterprise and the matter of remuneration².

The unsatisfactory integration of work within the penitentiary system was the subject of much discussion on imprisonment³. The notion of open environment slowly appeared as an opportunity to solve this problem. The 12th International Penal and Prison Congress held in La Haye in 1950 discussed a number of experiments carried out in minimum security institutions. Recommendations made at this congress contributed to the expansion of open system penitentiaries which seemed to facilitate the implementation of programs with emphasis on farming and industrial work and on the apprenticeship of a trade.

This formula proved to be successful from several points of view wherever it was applied⁴. However, with respect to the integration of the notion of prison labour, the open system was unsatisfactory except in the case of agricultural institutions which were used in the original experiments. Considering the rapid development of agricultural methods and the importance of this sector in the economy of a country, it is readily understandable that the open system could not solve the entire problem of prison labour.

The next step consisted of allowing the inmates to work in the community within private enterprise. The outstanding aspect of this devel-

opment is that work ceases to be a part of the sentence. Every effort is made to permit the inmates to perform their usual work and, if possible, to keep the job they held at the time of the arrest. If they are unemployed, they receive the necessary assistance to find employment. Imprisonment is then interrupted to allow the inmates to work normally in the community.

(B) *Theoretical Development*

There have been many attempts at solving the problems raised by delinquency with a solution placing emphasis on the delinquent's personality. This was a normal solution. Indeed, the great reformers of the second half of the XIXth century had inspired a movement which promoted the development of the inmate's personality. Prison conditions were "humanized" and systematized and programs were instituted. Institutional treatment thus made great strides towards the middle of the XXth century. This approach coincided with theoretical developments at a time when research demonstrated the existence of social causes in addition to psychological and individual causes of delinquency⁵.

A community oriented approach then appeared to be more apt to solve the problems of delinquents. Several social elements were included in the programs which had formerly been oriented towards individual treatment. This approach was advocated by the philosophical and scientific minds who supported a period of transition between imprisonment and freedom. Parole and probation services played an important part in the development of this approach because of their programs of assistance and supervision in the community.

This extension of programs to the community was also justified by numerous studies on the ill effects of imprisonment⁶. The results of these studies also formed the scientific basis of the measures recommended to reduce the negative effects of long prison sentences. Institutional programs were thus extended to the community to end the social isolation of inmates.

The remuneration of inmates working outside the institution in private enterprise is obviously the best evidence of this theoretical development following the evolution of the notion of prison labour, the discovery of social causes of delinquency and the evaluation of the prison experience. This notion has a variety of applications and appellations (semi-detention, semi-release, temporary absence, day parole, work release⁷) and the reasons for its application are also numerous (studies, medical or therapeutic treatment, family visits, etc.) although work remains the main authorized activity.

2. AMERICAN EXPERIENCE AND LEGISLATION

The American experience dates back to 1913 when Wisconsin voted the Huber law. Within a general framework of rehabilitation, this law provided that individuals could serve a work release sentence and continue to provide financially for their families by working in the community. This law served as a model for American experiments in releasing inmates for a certain number of hours usually for reasons related to work. Senator Henry Huber who promoted the concept explained it as follows:

Committing a man to jail with nothing to employ his time defeats the ends of humanity more often than advancing it by depriving his family of its breadwinner. Under the proposed (work release) law is shown the error of his ways, given his sentence, and kept employed so his family is not reduced to want.

(Zalba, 1970, p. 694)

This measure is usually reserved for delinquents guilty of offences punishable by a summary conviction. Few states (North Carolina and Maryland) have extended its application to criminal offences. At the beginning, this law often only applied to vagrants and alcoholics. The measure is therefore associated with short sentences.

The decision to apply this provision of the law is usually left to the discretion of the court⁸. Some states have a Parole Board or a Prison Administration Committee for such purpose. The sheriff of the community is usually the local administrator of this law⁹.

There are five reasons which may justify the application of this measure, all of which are clearly mentioned in the law or administrative rules:

- (1) To work in the community for remuneration;
- (2) To seek employment;
- (3) To run a personal business, exercise a profession or maintain a household;
- (4) To undertake or continue studies;
- (5) To obtain medical treatment.

It is therefore possible to conceive a wide extension of institutional programs to the community provided resources are available. Grupp (1964, p. 6) also mentions that this measure is used informally by judges and sheriffs, a very significant indication of the necessary flexibility of such measures.

Most of the states which provide for a work release sentence for reasons related to work also establish priorities for the use of the inmate's income. Inmates must first pay a lodging fee at the prison as well as a fee related to the operation of the program. The financial support of dependents, personal expenses, debts and other obligations, and finally,

savings to be withdrawn upon release, are usually the other established priorities.

The work release measure having been applied in a variety of ways in the United States, it would be difficult to review all of them¹⁰. Approximately 30 states presently have such legislation and the federal government adopted this measure in 1965 by voting the *Prisoner Rehabilitation Act*¹¹. In addition to the variety of legislation in this regard, the degree of implementation of this measure also varies between these states as well as between the counties of a same state, which makes any generalization difficult¹².

However, in all cases, work release involves imprisonment except during working hours. It differs from the measure which involves the inmate's progression to a halfway house and which is always a measure of transition between a long prison term and freedom. This period of transition is never imposed as a penal sanction by the court. It is one stage in a progressive system; it precedes the conditional or complete release and requires the inmates to have successfully passed the previous stages of the program. This measure of transition is therefore never applied at the beginning of incarceration as it often happens in the case of work release.

In keeping with the evolution from purely institutional to community oriented programs, the law also provided for furlough programs. The federal system introduced this measure at the same time as work release in 1965 in the *Prisoner Rehabilitation Act*. Twenty-two states have such programs and 16 others are planning their implementation. The objective of such programs is to facilitate social reentry by ending the social isolation of inmates. They also contribute to strengthening family relationships, provide an opportunity to make firm plans for parole and are quite simply a period during which the inmates can test their abilities to function in society.

There are many reasons for authorizing a temporary leave from the institution within these different programs, giving flexibility to their application, such as:

- (1) To attend funeral services for a relative;
- (2) To visit a seriously ill relative;
- (3) To obtain medical, psychiatric, psychological care as well as the other services not available within the institution;
- (4) To contact a prospective employer;
- (5) To make arrangements for a place of residence at the time of release from the institution;
- (6) Any other valid reason with respect to the promotion of social reentry.

An inmate must generally have served part of his prison term before becoming eligible for a furlough. This kind of program interrupts the sentence for a short and temporary period of time.

It is reasonable to believe that these community oriented programs will develop further in the future¹³ as the *National Advisory Commission on Criminal Justice Standards and Goals* observed in 1973.

3. NOTIONS OF SEMI-RELEASE AND SEMI-DETENTION

Before examining the situation in Canada, it would be useful to review the approach taken up to this point. We have emphasized two factors which promoted the transition from institutional programs to community oriented programs: the notion of prison labour and theoretical development. Work which was originally an inherent part of the sentence ceased to be considered as such. It became a simple economic activity carried out in the community. Theoretical development added social causes to the individual causes of delinquency. Attempts were then made to end the social isolation of inmates and to effect the transition between life in detention and life in the community.

We then quickly reviewed the American experience and legislation. The different laws mentioned each applied in some way the notions of semi-release and semi-detention which we will now discuss¹⁴.

Semi-release is a release measure applied for the purpose of providing a period of transition between a long prison term and freedom. The decision to apply such a measure is not made by the court but usually by an administrative committee. It is one stage in a progressive system which requires the successful completion of the previous stages of the program. Applied in the case of long sentences, a large portion of the sentence must first be served. Its immediate purpose is to allow the preparation of a parole plan or the final release at the end of the sentence. This measure is used mostly to allow inmates to work in the community but the undertaking of studies and other social activities may also justify its use.

Semi-detention is a prison measure applied by the court to eliminate the negative effects of imprisonment. This penal sanction does not refer to any institutional program. It is applied at the beginning of incarceration outside working hours. It is usually applied in the case of short sentences for the immediate purpose of preserving the inmate's job and to provide him the opportunity to support his family.

These two concepts give a different meaning to the notion of work in the community. In the case of semi-release, work takes on a very broad meaning. It becomes a transition project carried out in the community making use of various community resources. In the case of semi-de-

tention, however, work is defined as the inmate's usual occupation and is therefore directly related to the local economic structure and involves the participation of the employers.

As a result of theoretical development, the notions of semi-release and semi-detention relate differently to the necessity to end the social isolation of inmates and to facilitate the progressive social reentry of offenders. Semi-detention reduces the negative effects of imprisonment by shortening the prison term and by maximizing social interaction. Semi-release as a period of transition for inmates with long prison sentences complements the objectives of furloughs within progressive social reentry programs.

4. THE SITUATION IN CANADA

(A) *Preliminary Observations*

In Canada, penological practices have followed penological developments which have made the line between the institutional approach and the community approach less distinguishable and which have allowed the notion of prison labour to abandon its purely punitive aspect.

Before approaching the situation in Canada, we would like to make two observations of informative value. First, in order to place this fourth section in line with the previous sections, and to avoid any confusion between semi-detention and semi-release in Canada, we will examine Canadian legislation with respect to semi-detention. We will then indicate the provincial measures, different from the federal measures, which apply the notion of semi-release.

Semi-detention is now permitted and used in Canada by virtue of a law assented to June 15, 1972¹⁵. According to this law, the court may:

Where it imposes a sentence of imprisonment on the accused that does not exceed ninety days, order that the sentence be served intermittently at such times as are specified in the order and direct that the accused, at all times when he is not in confinement pursuant to such order, comply with the conditions prescribed in a probation order.

The decision to apply this measure is made by the courts which usually prescribe weekend detention in Quebec. Applied from the very beginning of imprisonment as a penal sanction, it can also be carried out on a daily basis in the form of interrupted imprisonment during working hours.

The conditions of semi-detention prescribed in the probation order are an important element of this measure. On the one hand, they define the specific terms to which the inmate must conform and on the other

hand, they refer to the personnel required to ensure that such terms and conditions are respected. Lack of data prevents us from making any specific criticism which, in any event, would be more suitably presented in another paper.

Let us now examine the provincial provisions relating to semi-release. Two Canadian laws, a federal law and a provincial law, made it possible for inmates to work outside the institution¹⁶. With the specific authorization of the local chief of police and to perform specific work, inmates from Ontario reformatories or industrial farms could be allowed to work in their community and could sometimes be allowed to sleep there. According to Lavell (1926, pp. 85-93), the program proved to be quite successful after five years of operation (1920-1926), with a failure rate of only 4.3%. However, it was abandoned in spite of its success. The economic structure of that period played an important part in this program and strong criticism overcame the supporters of this project.

Saskatchewan adopted a system quite similar to that of Wisconsin, mentioned earlier, by voting the *Corrections Act* in 1967¹⁷. Its "apprenticeship through work" program remains outside the judicial sentencing process. It applies to offenders convicted of provincial violations only.

In Quebec, section 19 of the *Probation and Houses of Detention Act*, assented to May 27, 1969, allows inmates to participate in a program carried out in the community under the authority of the director general. This program may consist of work, studies or any other activities likely to promote the social reentry of inmates who have been convicted of provincial or municipal violations.

(B) *Day Parole*

(1) *Definition and Principles*

This semi-release measure was introduced in Canadian legislation in 1969 borrowing the objectives of the American concept of "work release" which, by its diversified application, possesses characteristics which belong to both semi-detention and semi-release¹⁸. As we will see later on, however, this ambiguity has been removed from the application of day parole in Canada.

As stipulated in section 2(b) of the *Parole Act*, day parole is a legal provision by which an inmate may be authorized to serve part of his prison term outside the institution where he is held. It requires the inmate to return to prison "from time to time" or "after a specified period". It does not terminate the period of imprisonment. Day parole may be granted to carry out a specific activity or project during the period of imprisonment. It applies the same notion of "project at large" as parole.

The decision to grant day parole is made as usual by the Parole Board with the difference that the inmate's behaviour inside the institution is not considered as a criterion.

Another characteristic which emphasizes the relationship of this release measure with the period of imprisonment is that the inmate is "deemed to be continuing to serve his term of imprisonment" and is thus subject to the obligations and privileges of uninterrupted imprisonment. The inmate who is granted day parole does not have the status of the ordinary paroled inmate whose parole certificate specifically defines the terms and conditions of his release.

(2) *Criteria of Application*

Day parole is granted for rehabilitative purposes to allow the inmate to keep his regular job¹⁹, to continue his professional or academic training for a specific period of time and to benefit from a program of preparation for parole.

There is no specific eligibility date provided for day parole; however, inmates are usually required to serve a large portion of their sentences. The Board has set the minimum limit of one year's imprisonment before becoming eligible for parole. Day parole is usually applied either just before or just after the eligibility date for ordinary parole. This implies that it is not an automatic period of transition granted to all inmates and that it is often an additional stage. We are also led to the conclusion that day parole is applied quite often to a category of inmates which hardly corresponds to the criteria for ordinary parole. As a corollary, day parole seems to be a test to be successfully passed before ordinary parole is granted²⁰.

The duration of day parole is very flexible; it may vary from very short to very long. First granted for a period of three months, day parole is now usually granted for a period of four months and may even be extended in special cases at the discretion of the Board. The Board also has discretion to vary any initial projects for which day parole had been granted. As a rule, the Board tries to be very flexible in its decisions while preserving as much control as possible over these programs.

Day parole projects are very similar varying somewhat in their application depending on the place where they are carried out (community correction centers, maximum, medium or minimum security institutions). These variations relate mostly to the time of return and flexible weekend leaves. Furthermore, the district representative shares his responsibilities with the director of the institution when the inmate stays in a community correction center.

The present situation could be summarized as follows: eligibility for day parole is usually determined either in relation to ordinary parole or in relation to mandatory supervision. There are no criteria which exclude a category of inmate from the outset, however, as opposed to the criteria applied in granting ordinary parole, the "project at large" is given much consideration. It seems that the importance of a project is given more consideration than the individual himself. A "serious project" is likely to be carried out successfully (evaluation of personality and environment) and is readily compatible with a rehabilitation program. From the relationships between day parole and the other methods of conditional release, we are led to believe in the existence of a kind of system of "progressive" conditional liberation.

(3) *Criticism*

Our criticism of day parole will deal with the two aspects we considered during our study of day parole. We will first examine the conception or nature of these programs and then their operation in terms of administrative responsibility and physical resources.

Our analysis is more oriented towards a search for the actual situation than towards accomplishments from which we derived a definition of day parole and evaluated its success with certainty. It is difficult to grasp the situation of day parole because it is constantly changing through a series of adjustments. The flexibility of the program is its trademark both at the higher levels of the Board and Service and at the officer level. Attempts are being made to unify the concept of day parole as a promising means of rehabilitation.

The various conceptions of day parole justify the variety of application of this measure²¹. It is applied to difficult cases which do not meet the usual criteria for granting ordinary parole, especially in relation to mandatory supervision. The experience with this new clientele, which remains to be evaluated, is undoubtedly the most important attainment with respect to the objectives of this release measure. The program is also considered as a period of transition to be provided to the largest number of inmates. In this respect, it is evidently related to the eligibility date for ordinary parole. Day parole is also used as an extension of or substitution for an institutional program of professional training or treatment. It thus permits the use of resources not available within the institution. Finally, it is considered by some inmates as a "progressive" release taking into account the difficulties and special circumstances which justify its trial application, or as a period of preparation for life in society.

We have been able to detect two orientations in the procedure and use of day parole. Legal interpretations and the subsequent development

of policies have revealed a constant concern for *systematizing* the use of this release measure. Attempts have been made to set an "eligibility date" and projects must be "authorized" by the Board. A regulation also limits the flexibility of application of this measure. This characteristic of *flexibility* is mostly present with respect to application as a result of the various conceptions mentioned earlier which express the officers' desire to make it as flexible as possible. In their opinion, the "project" is always therapeutic even before its authorization.

We are now discussing a subject which will be dealt with further in a working paper on imprisonment. The types of decisions made by the Board as well as its role in the administration or supervision of sentences are discussed at length in this paper. Our only observation here is to point out the lack of uniformity of criteria applied at all levels of the correctional system.

We have observed two problems with respect to the operation of day parole programs. First, a problem of authority arose due to the complementary use of day parole and temporary leaves. We first observed that the now mandatory community investigation carried out before a temporary leave is made under the responsibility of the National Parole Service. It is recognized that this Service is best qualified for this task, however, it is illogically not included in the decision-making process. Secondly, prior to June 1, 1973²², certain inmates were granted back-to-back temporary leaves before the eligibility date or following a negative decision by the Board which amounted to long periods of time. In the first case, the Board was faced with an accomplished fact and in the second case, its decision was annulled in practice²³. This problem relates to the integration of a correctional program.

The last problem relates to the unsuitability of institutions from which such day parole projects can be implemented²⁴. The proximity of the institution to the place of work has become a requirement for the definite implementation and general use of this release measure in the community. Available institutions are presently inadequate²⁵. Very few of the resources used at this time really function adequately because most of them were not conceived to provide lodging for inmates on day parole; efforts are made to use existing institutions. The program is therefore physically limited in addition to its inherent problems.

(C) *(Temporary) Parole*

Often confused with day parole, their objectives are really very similar. Temporary parole has often been used to extend day parole to the weekend. It is more independent from the eligibility date for ordinary parole and thus can be granted very soon after confinement but for shorter and more specific periods of time (special projects). It is especially applied

to group projects. Its principal characteristic is that it adds more flexibility to day parole programs.

(D) *Temporary Absence*

(1) *The Law*

Introduced in the Penitentiary Act in 1960-61, temporary absence was submitted as an administrative measure which would decentralize decision-making in cases where a temporary leave from the institution is deemed justified by special and unforeseen circumstances:

I am quite sure hon. members will appreciate that there are many, many situations in which it becomes cumbersome and administratively unwise to seek the authority of His Excellence the Governor General every time it appears desirable to allow an inmate, for a short period, to be absent from the penitentiary.

(Fulton, 1961)

Section 26 therefore permitted the Commissioner or the director of a penitentiary to authorize the temporary absence of an inmate, with or without escort, "for medical or humanitarian reasons or to assist in the rehabilitation of an inmate". The 1960-61 Act has remained unchanged.

This provision was introduced in the Prisons and Reformatories Act in 1968-69 (s. 36), at a time when the penitentiary system applied this measure with increasing frequency within the framework of institutional programs.

In Quebec, section 20 of the Probation and Houses of Detention Act, assented to in 1969, confers the same authority to the Regional Director in the case of inmates convicted of provincial violations. This provincial law has been applied with increasing frequency for similar reasons.

(2) *Administration*

Temporary absence is therefore a temporary release measure applied as much as possible within a wider rehabilitation program. There are no legal provisions for the granting of temporary leaves at any specific times or regular intervals during a sentence of imprisonment. Practice has however established strong contingents of inmates on leave at special times of the year around Christmas, New Year's Day and Easter. The Solicitor General announced on January 16, 1973 that 1,386 inmates had been granted a minimum temporary leave of three days during the 1972-73 Christmas season. Temporary leaves are also often granted to prepare for or complement a conditional release measure. The following figures submitted to the Senate March 3, 1972 reveal the scope of this temporary absence program:

Year	number of Temporary leaves
1969	6,278
1970	18,008
1971	30,299

Temporary leaves are usually granted for rehabilitative, humanitarian or medical reasons. The figures available in this regard for the whole of Canada date back a few years²⁶ and are not suitable for scientific interpretation. In five out of six Quebec institutions, the percentage of temporary leaves granted is distributed as follows²⁷:

rehabilitative reasons	53.3%
humanitarian reasons	2.5%
medical reasons	44.2%

A directive issued by the Commissioner of Penitentiaries explains these categories in detail. Medical reasons do not require any comments a priori and we are unaware of the difficulties which may arise with respect to application. They are granted with escort and out of necessity. Humanitarian reasons usually refer to special, civil or religious events which normally require the presence of all members of the family. Illness and hardships in the family are also considered as humanitarian reasons to grant a temporary leave. Leaves for rehabilitative purposes are usually granted to strengthen personal relationships, to continue education or professional training, to join the labour market or to participate in community activities including recreational activities.

Since January 28, 1972²⁸, temporary absence without escort may not be granted unless the inmate has served at least six months of his term of imprisonment. Leaves may only be granted in exception to this general eligibility rule for humanitarian or medical reasons and in such circumstances, the inmates must always be escorted. This eligibility rule is also varied by special restrictions and conditions prescribed in Commissioner's directive no. 228:

1. No temporary leave may be granted for rehabilitative purposes to inmates who have been sentenced to life imprisonment or preventive detention, or who are recognized members of organized crime, before they have served three years of their sentence.
2. No temporary leave may be granted without escort for any reason whatsoever to inmates convicted of murder, up to three years before their eligibility for parole.
3. No temporary leave may be granted for rehabilitative purposes to inmates recognized by the courts as dangerous sexual offenders.

Other restrictions are provided in the cases of inmates who have had their parole suspended, who have been refused parole, who have been convicted of kidnapping or skyjacking, or who have committed offences of a sexual nature. Inmates whose ordinary or mandatory parole has been

forfeited or revoked, as well as inmates convicted for escaping or being unlawfully at large, must serve six months or three years (according to their category) before again becoming eligible for a temporary leave. The directive provides for other cases which are however too special to mention here.

A selective system has therefore been developed to ensure public protection in the case of temporary leaves granted for rehabilitative purposes. In the case of temporary leaves granted for humanitarian or medical reasons, the decision rests more on the terms and conditions of the leave, that is whether or not the inmate should be escorted, than on the authorization to be at large.

In addition to the objective rules mentioned above, the inmate's eligibility for a temporary leave for humanitarian and rehabilitative purposes is established from several criteria of evaluation, such as his participation in the institutional program, the quality of his family relationships, the potential impact of a temporary leave on his family situation, the incentive provided by this measure and finally, the inmate's expected conduct on leave.

A community investigation by the National Parole Service always precedes the granting of temporary leaves without escort for rehabilitative purposes. The first investigation is updated with each subsequent temporary leave. The institution and the inmate must always designate a sponsor in the community (which may be an individual or an agency) for each leave.

We must add to the above description that facilities are also provided for the granting of temporary leaves to groups of inmates for rehabilitative purposes such as: a social project (theater), special programs (A.A. meeting), participation in sports or sports events.

(3) *Criticism*

We observed, on the one hand, that the legal provisions on temporary absence have remained unchanged since 1960-61 and, on the other hand, the number of temporary leaves granted has increased remarkably since 1969, especially in 1970. The law intended to allow inmates to leave the institution for a temporary period of time within a practical and effective administrative framework. According to the Act, the exercise of this power, which was then related to the exercise of the prerogative of mercy, became an integral part of the inmate training program. It seems that temporary leaves were granted in consideration of pressing and unforeseen circumstances until 1969 and then as part of a program. This development is best observed in the available figures on the granting of temporary

leaves. Because of constant change however, it is impossible to establish criteria for the assessment of such a program.

Directive no. 228 of the Commissioner is decisive with respect to the nature of temporary leaves. It is really a privilege granted by the Commissioner or the director of the penitentiary. Whereas the notion of temporary absence is customarily considered to resemble a "period of transition in the community" (to the extent that it has come into conflict with that of day parole), this aspect of "privilege" should be abandoned in favour of the present development of this program.

Accurate figures on the granting of temporary leaves are presently unavailable. Indeed the categories of data collected vary across the country as well as within a same region. Also, different elements are included in these categories giving undue importance to certain categories and affecting the true scope of the program²⁹. Due to these flaws, we are unable to rely on Canadian statistics to support our analyses³⁰ and we completely agree with the comments made by the Senate Committee on available statistics:

Statistical information on other programs such as remission, probation following imprisonment, temporary absence, etc., is either non-existent or almost meaningless.

(Senate Report, p. 125)

(E) *Summary*

We have completed our observations on day parole and temporary absence constantly referring to the term of imprisonment. Indeed, we reviewed the notion of prison labour which, when community oriented, is best described by the expression "community project". Strictly speaking, the notion of work has come to include the undertaking of studies, professional training and gradual entry in the labour market.

It was also our intention to emphasize theoretical developments, observing that the discovery of social causes in addition to the purely individual causes of delinquency and the study of the negative effects of imprisonment justified the implementation of a social reentry program.

Before examining the situation in Canada, we briefly reviewed the situation of the countries where this double development occurred. The measures implemented to carry out these ideas were diverse and so were their integration in programs. Finally, the rules and regulations provided in the various legislations complicated their application.

In Canada, day parole and temporary absence clearly have characteristics of semi-release and their integration in the correctional system is also based on that concept. A portion of the term of imprisonment must be served before either of these measures can be applied and the eligibility

date for either of these measures must be regulated. This first principle of application would establish a progressive release system which would inevitably involve a period of confinement but the stages and criteria would be known in advance by the courts, the inmates and the administrators of the institution.

The eligibility date for day parole should precede the eligibility date for ordinary parole. With respect to the eligibility date for a temporary leave granted for rehabilitative purposes, the present delay of six months should be replaced by a fraction of the total prison term but the first temporary leave should precede the eligibility date for day parole. The progressive character of these measures should be the decisive criterion for eligibility.

Because of its objectives, a release measure is necessarily community oriented. The decision to grant these measures should also reflect this community aspect and should therefore fall under the competence of the most qualified body, the Parole Board. Single authority with respect to these measures intended to effect the progressive reentry of delinquents in society, would put an end to the present ambiguous situation by settling the problem of responsibility for decision. Single authority would also result in improved control over programs and improved integration of programs in the correctional system.

With respect to day parole, we believe that it should be assessed systematically after a specified fraction of the term of imprisonment has been served and that it should be applied with great flexibility. The authorized project developed with the assistance of professionals from the institution and from the Parole Service should meet the fundamental criteria based on an individualized program of social reentry. The duration of the project should not be established in terms of the eligibility date. It could be of very short duration corresponding to the present motives for granting a temporary leave for rehabilitative purposes, except for reasons related to family and professional relationships. Day parole should include all projects which precondition for full parole. It would then become a period of transition.

On the other hand, temporary absence should fall within the competence of the Parole Board and should be granted primarily for the purpose of maintaining or establishing meaningful interpersonal relationships with the inmate's wife, children, relatives and sometimes close friends³¹. The requirement to carry out a community investigation should be maintained. The results of the first temporary leave would be added to the date on the assessment of the social environment and would serve to establish a program of regular leaves somewhat similar to the Swedish program³².

The system of transition should therefore consist of specific stages and specific eligibility criteria known to the inmates from the beginning of their incarceration. The various release stages should never be considered as a privilege or a right but as an opportunity to promote the social responsibility of inmates.

[Temporary] day parole should remain an additional measure applied to release an inmate for a specific period of time and for a specific project in consideration of the serious prejudice that would be caused to the inmate or his immediate family if such project were delayed. [Temporary] day parole could also be granted in special cases at the beginning of the period of imprisonment taking into consideration the reasons for imprisonment.

Temporary absence for medical and humanitarian reasons should continue to be granted according to the criteria presently applied by penitentiary authorities. Additional reasons cannot be included in a program and do not justify the intervention of the Parole Board. Only the Canadian Penitentiary Service may authorize a temporary absence with or without escort for such reasons.

The purpose of these recommendations is to improve the present situation in four areas:

- Improve public information on the administration of these measures;
- At the penitentiary level, the measures will be applied objectively according to specific criteria;
- At the professional level, the measures will remain a flexible means of carrying out a correctional program;
- At the judicial level, the sentence of imprisonment will consist of a period of detention always followed by gradual stages of social reentry.

We believe that the correctional system should be simplified to allow it to function as economically as possible and to attain its objectives.

The present application of the two release measures we have just examined do not completely meet the objectives of justice and equity.

References

(Day Parole and Temporary Absence)

1. A good review and analysis of the difficulties in introducing industrial work in penitentiary programs may be found in Sutherland and Cressey (1966, chap. 25, pp. 537-553).
2. Cf. Gill, H. B., (1931, pp. 83-101).
3. Cf. Morris, N., (1965, pp. 267-292).
4. Cf. Cornil, P., (1968, pp. 394-396).
5. Referring particularly to the research work carried out by the Chicago School and by other writers such as Shaw, McKay, Sutherland, Cloward, Ohlin, Cohen, etc.
6. Critical studies were undertaken in various disciplines such as architecture, psychology, behavioural psychology, sociology and psycho-sociology. A recent work by Nagel, W. G., (1973) makes an excellent review of this criticism from data collected in penitentiaries. It also has a very good bibliography.
7. For a review of the various American concepts of work release, cf. Grupp, S. E., (1965, pp. 8-9).
8. For the opinion of a judge on this measure, cf. Sloane, J., (1964, pp. 42-44).
9. For a study from the sheriff's viewpoint, cf. Grupp, S. E., (1967, pp. 513-520).
10. The best summary on the application of work release in the United States may be found in three articles written by Grupp, S. E., (1963, 1964, 1965).
11. Cf. Carpenter, L., (1966).
12. Cf. Ayer, W. A., (1970, pp. 53-56).
13. Several European countries (France, Belgium, Denmark, Sweden, Norway) have set up programs similar to the American experiments in their objectives. Their methods of application sometimes differ substantially according to the legislations and correctional systems. Available documentation is unfortunately insufficient to permit us to make a detailed analysis of these programs to detect major differences or aspects likely to give a new perspective to the American approach. Note that the European programs are never as extensive as the American programs both as regards their place in the correctional system and as regards the inmate population involved.
14. The following definition of these concepts only takes into consideration the experiments described earlier.
15. 21 Elizabeth II, art. 662.1 (1972).
16. 6-7 George V, c. 21, art. 3 (1916) and Statutes of Ontario (1921), c. 93.
17. For a more complete comparison with the Huber law, cf. MacDonald J. A., (1968).

18. Chapter 2, third section, of this paper contains a brief comment on the objectives of day parole as stated by the former chairman of the National Parole Board.
19. In this respect, cf. the comments by Landreville *et al.* (1972 pp. 44-45).
20. This "test" aspect is commented upon in Landreville *et al.* (1972, pp. 48-49).
21. To illustrate day parole, here are some statistics for the Quebec region which cover 175 cases of day parole between April 30, 1972 and April 30, 1973. The data shown below was collected in the form of a questionnaire.

- 60% of inmates found a new job	
- 88% of projects were carried out	
- duration (in weeks) of day parole:	
0-4	16.6%
4-12	37.7%
12-18	12.6%
18 and over	33.1%
- 61.1% of inmates were recidivists	
- relation to other methods of release:	
(a) granted before eligibility date	40%
(b) granted upon eligibility date	2%
(c) granted after eligibility date	37%
(d) granted before mandatory release	4%
(e) no relation	17%

We point out that this data was made available to us and not collected as part of our work. We have presented it for its descriptive and suggestive value.

22. The Chairman of the National Parole Board announced a new policy on that date, which put an end to such practices.
23. This conflict of jurisdiction between the National Parole Board and the Canadian Penitentiary Service was the subject of discussion in other works: Landreville *et al.* (1972, pp. 54-55), Hugessen (1972, pp. 29-32), Report of the Senate Committee on Parole in Canada (1974, pp. 99-102).
24. This problem of inappropriate residence was pointed out on many occasions in our review of the various legislations in the second part of this chapter.
25. As ascertained by the following facts: the transportation problems at Stoney Mountain, the limited number of beds at Cowansville, double population at Montée St-François, the transfer problems at the St-Hubert Community Correction Center, the comments raised by the report on annex farms.
26. We have the national data made available to the Senate Committee on Parole in Canada.
27. The following is the data that was made available to us for each Quebec institution:
See table, page 147.
28. Additional restrictions were imposed following an incident which raised much publicity. As a result, 366 fewer inmates were granted a leave for the 1972-73 Christmas season than for the 1971-72 Christmas season, as the Solicitor General informed us in a press release on January 16, 1973.
29. We have mostly extrapolated from the Quebec region where we were able to control the compilation of data. Open cooperation by most of the institutions is another methodological guarantee.
30. Here are three examples which illustrate this observation on the various recording systems used in the institutions:

(a) At the regional level: Quebec institutions have not used "back-to-back" temporary leaves much but rather day parole. However, the categories include the same elements and the first measure has disappeared in favour of day parole.

(b) At the institutional level:

1. The category "work outside the institution" may include the daily maintenance work performed in an institution other than that where the inmate is detained.

2. The category "medical reasons" may include group X-ray examinations outside the institution.

31. Thirty-one percent of temporary leaves authorized in Canada between September and December 1971 (Senate Committee on Parole in Canada) were granted for such reasons compared to 24% of temporary leaves authorized in Quebec between April 1, 1973 and March 31, 1974.
32. Two kinds of leaves are granted. The "regular" leave is an integral part of the sentence and, according to the sentence, the type of institution and the category of the offence, regulations provide an eligibility date for the first leave and other leaves at fixed intervals unless an inmate's file contains adverse reports. The decision to grant such leaves is made by a regional administrative board or by the penitentiary administration.

Special leaves are granted according to well-defined criteria:

- (1) To visit a seriously ill relative or to attend funeral services for a relative.
- (2) To give testimony in court or to protect the inmate's civil rights in some way.
- (3) To contact a prospective employer or make arrangements for a place of residence in anticipation of a conditional or final release.
- (4) To be at large for a few hours if the inmate's application is justified.
- (5) To be transferred to another institution.

It is interesting to note that inmates who are granted a work release licence may also be granted leaves for weekends and other civil holidays. Inmates belonging to the category of young adults may also be granted a special leave up to two evenings a week.

This measure is widely used in Sweden and evidently successful. Most violations consist of delays in returning at the prescribed time or returning in a drunken state. This leave system has made institutional life more natural and less tense. Cf. Erikson, T., (1968, pp. 417-427) who was personally involved in the development of this program.

Number of temporary leaves (Quebec region)*

Type of institution and total population	Total number of temporary leaves	Reasons		
		Rehabilitative	Humanitarian	Medical
Minimum security 125	570	354	34	182
Maximum security 391	443	3	1	439
Maximum security 160	274	2	5	267
Medium security 428	1,452	1,005	47	400
Medium security 499	1,847	1,082	27	738

*data compiled from April 1, 1973 to March 31, 1974.

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Legal Controls
for the
Dangerous Offender

By
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Contents

INTRODUCTION	157
Controls on Offenders of Risk Under Existing Canadian Law .	159
(a) Preventive Detention in Canada: Two Existing Forms	159
(b) Current Sentencing Practices	166
(c) Federal and Provincial Mental Health Legislation ...	168
Sentencing Structure and Dangerous Offender Legislation: a Statement of the Issue	173
Designation and Selection	175
(a) Possible Groups	175
(b) Identifying the "dangerous offender"	176
(c) The Problem of Devising an Adequate Statutory Defi- nition	182
Custodial or Treatment Regime of those Classified as Dangerous Offenders	185
Some Matters of Procedure	189
Alternative Models for Dangerous Offender Legislation	195
Conclusion	205
References	209

Introduction

The debate about the need for special legislation for offenders of risk who may require lengthy or special terms of imprisonment is a major recognizable facet of the larger debate currently raging about our correctional system, not only among those directly involved in or with corrections, but also among the public and in the media. The “crime problem” needs no introduction as a public concern, and the public attention understandably focuses on that proportion of the offender population, variously estimated in size, perceived as ‘dangerous’ or otherwise cause for alarm. This is the group, it is argued, that requires special consideration—the specific allocation of resources and concern—the creation in effect of a subsystem within the larger correctional system of the criminal process.

As the Solicitor General of Canada, the Honourable Warren Allmand has stated:¹

I think we have to face the fact that some offenders can not be rehabilitated—that some will require continuing institutionalization or close supervision in society for most of their lives. We will have to find reliable ways of identifying and treating such persons, and humane programs, with adequate review provisions, for their perpetual treatment as may be needed.

In this paper the issues involved in the creation of such a special offender category are raised and discussed. They are by no means easy of resolution, ranging as they do from identifying the target group, through problems of procedure and evidence, to the relation of proposed special provisions to the general principles of sentencing policy and to the overall structure of sentencing law. In many areas a certain uneasiness must overtake the reader as basic assumptions are exposed as vulnerable, and the state of the knowledge exposed as tentative.

Identifying the group of offenders of concern necessitates discussion of possible criteria for selection, and of the problems of devising a statutory formulation suitable for legal purposes. The state of criminological and medical knowledge must be considered, not only with respect to such formulation, but also in the subsequent application of any proposed law. This in turn raises the question of the reliability of clinical judgments, or of experience tables, or of any other possible device as a basis for predictive assessment.

The relation of special provisions, if any, to the general structure and principles of sentencing law demands consideration of basic questions concerning the purposes of sentencing. The procedural and evidentiary rules that should govern selection, assessment and release raise further issues, both in their relation to the foregoing and in relation to the condition of the special confinement of the designated group, whether it be under a treatment regime or a custodial regime.

The condition of the confinement in particular is a vulnerable area insofar as insupportable assumptions are concerned. A treatment regime may be more desirable in human terms than a bare custodial regime that warehouses a select group of inmates. But what if the presumed treatment does not exist—or, even worse, if “treatment” would merely be custody in disguise? Further, what if the treatment exists or can be developed—will the facilities, financial resources and personnel be available or made available?

The paper starts with a consideration of the present Canadian law, including the two existing forms of preventive detention provided for in the Criminal Code. Reference is made throughout the paper to the Report of the Canadian Committee on Corrections,² the Ouimet Committee, which is the last government group to deal with these provisions in the context of reform. It will become apparent that in our view the present Code provisions are deplorable, and that the proposals of the Ouimet Committee are unsatisfactory and in important respects misguided.

Controls on Offenders of Risk Under Existing Canadian Law

(a) *Preventive Detention in Canada: Two Existing Forms*

Part XXI of the Criminal Code makes provision for a sentence of preventive detention, wholly indeterminate in duration,³ for two classes of convicted persons—the “habitual criminal” and the “dangerous sexual offender”.

The major difficulties that such legislation presents⁴ provide some basis for assessing any new scheme of preventive detention that is proposed to replace the two existing forms.⁵

The habitual criminal legislation was enacted in Canada in 1947,⁶ and was modelled after an English statute, *The Prevention of Crime Act, 1908*.⁷ The Canadian version specified a fully indeterminate life term in contrast to the term of five to ten years that could be added to the initial sentence under the original English Act.⁸ Ironically, the Canadian provisions were introduced at the very time that preventive detention in the form conceived by the 1908 statute was in the process of being abolished in England.⁹ The Canadian law was amended in 1961 and in 1969.¹⁰ Omitting provisions of a purely technical nature, the relevant sections of the Criminal Code now provide as follows:

688. (1) Where an accused has been convicted of an indictable offence the court may, upon application, impose a sentence of preventive detention in lieu of any other sentence that might be imposed for the offence of which he was convicted or that was imposed for such offence, or in addition to any sentence that was imposed for such offence if the sentence has expired, if . . .

(a) the accused is found to be an habitual criminal, and

(b) the court is of the opinion that because the accused is an habitual criminal, it is expedient for the protection of the public to sentence him to preventive detention.

(2) For the purposes of subsection (1), an accused is an habitual criminal if

(a) he has previously, since attaining the age of eighteen years, on at least three separate and independent occasions been convicted of an indictable offence for

which he was liable to imprisonment for five years or more and is leading persistently a criminal life, or

(b) he has been previously sentenced to preventive detention.

690. (1) The following provisions apply with respect to applications under this Part, namely,

- (a) an application under subsection (1) of section 688 shall not be heard unless
 - (i) the Attorney General of the province in which the accused is to be tried consents,
 - (ii) seven clear days' notice has been given to the accused by the prosecutor, either before or after conviction or sentence but within three months after the passing of sentence and before the sentence has expired, specifying the previous convictions and the other circumstances, if any, upon which it is intended to found the application . . .

(2) An application under this Part shall be heard and determined by the court without a jury.

693. An accused who is sentenced to preventive detention may be confined in a penitentiary or part of a penitentiary set apart for that purpose and shall be subject to such disciplinary and reformatory treatment as may be prescribed by law.

694. Where a person is in custody under a sentence of preventive detention, the National Parole Board shall, at least once in every year, review the condition, history and circumstances of that person for the purpose of determining whether he should be granted parole under the *Parole Act* and if so, on what conditions.

In reference to habitual offender laws in the United States, the chief reporter for the American Law Institute's Model Penal Code has stated:

"[T]he consensus is that they are a failure, productive of chaotic and unjust results when they are used, and greatly nullified in practice."¹¹ There is considerable evidence that this is the Canadian experience as well. One of the most serious criticisms is that such provisions are inconsistently applied. Because of the severe nature of the penalties involved, the statutes tend to be strictly construed by the courts,¹² and judges and prosecutors alike often display reluctance to apply the legislation. Of 80 inmates in Canadian penitentiaries on February 26, 1968, who had been sentenced to preventive detention under the habitual criminal provisions, the Ouimet Committee lists 45 as being from British Columbia, of which 39 were sentenced in Vancouver.¹³ Equally significant is a study of 184 penitentiary recidivists, all of whom had been selected because of deep and persistent involvement in a life of crime. Although over half of this group had been convicted on three separate and independent occasions of indictable offences punishable by imprisonment for five years or more, not one of the group had been sentenced to preventive detention under Part XXI of the Code.¹⁴ The requirement of consent of the Attorney General to the initiation of habitual criminal proceedings has clearly not served to secure even rough uniformity in practice.¹⁵ Indeed, this very requirement of "consent" constitutes one of the principal objections to this type of proceeding—that such uniformity of practice that the courts could achieve is

largely negated by divorcing these special disposition measures from the regular body of sentencing law. In recommending repeal of this legislation the Ouimet Committee concluded that "legislation which is susceptible to such uneven application has no place in a rational system of corrections."¹⁶

There are other objections to the *habitual* criminal provisions. The seriousness of the penalty and the scope for its differential application make a prisoner highly vulnerable to prosecutorial plea bargaining.¹⁷ Many persons would consider that the indeterminate sentence is too long or that it is perceived as arbitrary in its imposition.¹⁸ In particular, it takes inadequate account of the gravity of the offence of last conviction, in consequence of which the sentence of preventive detention was imposed¹⁹—an especially relevant criticism in Canada because of the high maximum sentences of imprisonment that are fixed by law for many offences that are not, in the ordinary case, inherently dangerous.²⁰ Moreover, preventive detention is usually imposed upon an offender when he is in his mid-thirties or older, at the stage in life when, for many offenders at least, criminality begins to abate²¹—and arguably also, when extended confinement is least likely to have positive therapeutic value.²² Added to all of this is the very real question about placing such extraordinary sentencing powers in the hands of a magistrate or provincial judge.²³

One of the most serious criticisms of the habitual criminal legislation is that it does not reach the types of offenders for whom special sanctions might be appropriate. It is ineffective in dealing with those engaged in organized and professional crime because, by reason of the undercover nature of their activities or the use of underlings, such offenders almost invariably escape prosecution under the law. Nor, it seems, is the law an effective device for identifying and isolating the peculiarly "dangerous" offender. Both English and American experience bear these observations out.²⁴ A study of the 1908 English Act concluded: "The Act was aimed at the 'professional' and 'dangerous' criminal—it tended to press largely upon the persistent minor offender, the habitual nuisance. The requirement of penal servitude as a condition precedent to preventive detention did not prevent this; . . . The Act reached an insignificant proportion of the criminals who should have been declared habituals and sentenced to preventive detention."²⁵ The Canadian experience is similar. This may reflect the strong, though not unanimous judicial sentiment for wider application of the provisions.²⁶ Reviewing the lifetime criminal records of the 80 habitual criminals in Canadian penitentiaries on February 26, 1968, the Ouimet Committee concluded:

1. That almost 40 per cent of those sentenced to preventive detention would appear not to have represented a threat to the personal safety of the public.
2. That perhaps a third of the persons confined as habitual offenders would appear to have represented a serious threat to personal safety.

3. That there is a substantial number within the 80 persons with respect to whom there is not enough evidence to warrant a conclusion that they represented a serious threat to personal safety.

The Committee concludes that while the present habitual offender legislation has been applied to protect the public from some dangerous offenders, it has also been applied to a substantial number of persistent offenders who may, perhaps, constitute a grave social nuisance but who do not constitute a serious threat to personal safety.²⁷

Another commentator has pointed out:²⁸

The present situation is anomalous in that the truly dangerous offender will probably be given such a long sentence for his substantive offence that he will not have the opportunity to meet the conditions for being found an habitual criminal in terms of the present legislation. As well, the dangerous professional offender (e.g. a professional killer) is often able to avoid detection or conviction so that it is unlikely that he will meet the criteria as well. It is simply unlikely that the truly dangerous offender (with the possible exception of the recidivist armed robber) will collect the four substantive convictions necessary for being found to be an habitual criminal—it is more likely that such an individual will either be serving a long penitentiary term or will be detained in a mental institution.

There is still another criticism brought against the habitual criminal sections: "To reach a conclusion about an individual's criminality requires an awareness not only of his criminality, but a study of his total personality . . . There is no condition which stipulates that there must be a psychiatric assessment, as there is for the criminal sexual psychopath, where the evidence of at least two psychiatrists is required."²⁹ This leads to a consideration of the second form of preventive detention provided for under Part XXI of the code.

The "dangerous sexual offender" provisions were first enacted in 1948, as the "criminal sexual psychopath" provisions of the Criminal Code.³⁰ The sexual psychopath laws are a distinctly American phenomenon. Minnesota, in 1939, passed the first such statute to pass judicial scrutiny, a 1937 Michigan statute having been struck down as unconstitutional.³¹ Immediately after World War II, sexual psychopath laws—taking a variety of forms, and often later subject to substantial, and sometimes recurring revision—were passed in state after state in rapid succession, until by 1960 statutes existed in twenty-five states and the District of Columbia.³² Their origin has been attributed by one commentator to "the intersection of three general trends in modern criminology: the growing acceptance of the tenets of positivistic criminology, the expanding influence of the psychiatric interpretation of crime as symptomatic of mental disorder, and the greater frequency of attempts at a priori, preventive legal action in the criminal law process."³³ The influence of the mass media in generating public pressure for such legislation, through dis-

proportionate and often misleading reporting of sex offences, has also been frequently noted.³⁴ Referring to the three “trends” listed, the same writer continues: “All . . . offer techniques and objectives with great reform appeal, and it is perhaps this gloss of desirability that disguises their most alarming aspect: they demonstrate the willingness of lawyers to turn over to the behavioural science disciplines large areas of legal domain, while uncritically assuming that these disciplines ‘contain within themselves sufficient safeguards against unwarranted interferences with individual freedom in the exercise of official power in the process of criminal justice administration.’”³⁵ In this context, it is of interest to observe that the debate in the House of Commons on the introduction of the original provisions in 1948 occupies only seven pages of Hansard.³⁶

The 1948 Canadian “criminal sexual psychopath” provisions were modelled on the Massachusetts law of 1947.³⁷ A Royal Commission was appointed in 1954, under the chairmanship of the then Chief Justice of Ontario, “to inquire into and report upon the question whether the criminal law of Canada relating to criminal sexual psychopaths should be amended in any respect and, if so, in what manner and to what extent.”³⁸ The Commission reported in 1958, and legislation followed in 1961 implementing most of its recommendations.³⁹ A further amendment of substance was made in 1969, following the celebrated *Klippert* case.⁴⁰ Again, however, the criticisms of the legislation go to more fundamental issues than those addressed by the 1961 or 1969 amendments. The important sections—in addition to sections 693 and 694, quoted previously—provide as follows:

687. In this Part

“dangerous sexual offender” means a person who, by his conduct in any sexual matter, has shown a failure to control his sexual impulses, and who is likely to cause injury, pain or other evil to any person, through failure in the future to control his sexual impulses.

689. . . .

(1) Where an accused has been convicted of

(a) an offence under Section 144, 146, 149, 155, 156 or 157; or

(b) an attempt to commit an offence under a provision mentioned in paragraph

(a), the court shall, upon application, hear evidence as to whether the accused is a dangerous sexual offender.

(2) On the hearing of an application under subsection (1) the court shall hear any relevant evidence, and shall hear the evidence of at least two psychiatrists, one of whom shall be nominated by the Attorney General.

(3) Where the court finds that the accused is a dangerous sexual offender it shall, notwithstanding anything in this Act or any other Act of the Parliament of Canada, impose upon the accused a sentence of preventive detention in lieu of any other sentence that might be imposed for the offence of which he was convicted or that was imposed for such offence, or in addition to any sentence that was imposed for such offence if the sentence has expired.

(1) The following provisions apply with respect to applications under this Part, namely,

(b) an application under subsection 689(1) shall not be heard unless seven clear days' notice thereof has been given to the accused by the prosecutor either before or after conviction or sentence but within three months after the passing of sentence and before the sentence has expired, and a copy of the notice has been filed with the clerk of the court or with the magistrate, where the magistrate is acting under Part XVI.

(2) An application under this Part shall be heard and determined by the court without a jury.⁴¹

Aside from specific criticisms, the very concept of the criminal sexual psychopath laws, even as modified, has been subject to radical challenge. These laws, it is alleged, rest on a number of articles of belief, largely erroneous, which can be summed up in the following propositions: (1) that serious sex crimes are prevalent and rapidly increasing; (2) that the victims of a sexual offence almost invariably suffer substantial physical or psychological harm; (3) that sex crimes are committed by "degenerates", "sex fiends" or "sexual psychopaths", who exist in substantial numbers; (4) that such offenders continue to commit serious sex crimes throughout life because they have no control over their sexual impulses; (5) that the minor sex offender, if unchecked, progresses to more serious types of sexual crime; (6) that it is possible to predict those individuals who are likely to commit serious sex crimes; (7) that "sexual psychopathy" or sexual deviation is a clinical entity; (8) that reasonable treatment methods to cure deviated sex offenders are known and employed—and, even if they are not, permanent incapacitation is necessary because of the potential danger that such offenders represent; (9) that since the sexual offence is in the nature of a mental malady, professional advice—and possibly even decisions—as to the identification, disposition and release of such offenders should come exclusively from psychiatrists; and (10) that sex control laws of this kind serve to reach the brutal and vicious sex criminal, and should be adopted generally to eliminate sex crimes.⁴² All of these propositions, it is claimed, are either false or, at best, questionable.⁴³ This is not to say that there are not dangerous sexual offenders—only that the nature of the problem, and the appropriate legislative response, are popularly misconceived.

Specific criticisms of the dangerous sexual offender provisions include some that have already been mentioned: that the law is inconsistently applied;⁴⁴ that it renders the accused vulnerable to prosecutorial plea bargaining;⁴⁵ that the indeterminate life sentence is undesirable;⁴⁶ that the law places too much power in the hands of a magistrate or provincial judge;⁴⁷ and that it does not reach the types of offenders for whom such drastic sanctions should properly be considered. The adequacy of psychiatric assessments under existing law and practice has also been crit-

icized. The Ouimet Committee reported: "Frequently, the opinion of two psychiatrists formed as a result of one or two interviews, supplemented by the evidence given at trial and an examination of such documentary evidence as may be available, constitutes the principal evidence upon which a finding is made . . . The Committee is gravely concerned that the present law permits a determination that a person is a dangerous sexual offender on such an inadequate basis . . ."48

A frequent complaint made against American sexual psychopath laws is that they tend to be invoked in respect of many nuisance-type, non-dangerous sex offenders.⁴⁹ A related criticism is that they are not effective in reaching those offenders who do present a risk of serious sex crime, or that the category "sex offences" ought to be reassessed on a basis more meaningful from the psychiatric point of view than the superficial classification arising from legal definitions. Guttmacher, in a study of 100 consecutive sex offenders examined in Baltimore Supreme Court Clinic reported that, of 36 who were convicted of crimes involving the use of force or threats of force, only one had been previously convicted of a sex offence, whereas conviction for non-sexual offences was common.⁵⁰ Such limited data as were available to the Ouimet Committee tended to bear out the first of these two criticisms.

A report to the Ouimet Committee by Dr. George Scott, the consulting psychiatrist at Kingston Penitentiary, indicates that of the 20 persons presently confined in Kingston Penitentiary, who have been sentenced as dangerous sexual offenders, nine (45 per cent) are not dangerous in terms of physical violence. Of the remaining 11 (55 per cent) considered dangerous, 5 or almost half are mentally and certifiable as such.

It also appears from the study conducted by Dr. Marcus that a significant number of persons found to be dangerous sexual offenders in British Columbia exhibited sufficient evidence of mental illness as to require long term treatment in an appropriate psychiatric setting.⁵¹

A related criticism has also been made by Guttmacher:⁵² "I contend that burglary, the offence of breaking and entering at night . . . is far more likely to be a forerunner of rape than homosexuality, voyeurism, exhibitionism or any other type of sexual offence." He concluded:

[M]any offences which from a legal point of view must be deemed nonsexual *are* basically sexual. Arson has come to be recognized as such a crime. Burglary, assault and cutting cases often have a sexual origin. In many criminal acts the sexual basis is primary but remains covert.

. . . Our research clearly indicated that the basic personality structure of the burglar resembled that of the rapist far more closely than that of the exhibitionist . . . Thus I find it far sounder psychiatrically to include the really serious sex offenders among the general group of dangerous offenders than to isolate them in a separate category. This is justified from a practical point of view, for the disposition and treatment of the dangerous sex offender need not differ radically from that of the more general group.⁵³

Taking into account many of the above criticisms—and also, apparently, the rather general recommendations to the same effect of the Committee on Legislation and Psychiatric Disorder of the Canadian Mental Health Association⁵⁴—the Ouimet Committee recommended that the present habitual criminal and dangerous sexual offender provisions be repealed and replaced by dangerous offender legislation. Appropriate references will be made to the Committees' proposals in the discussion that follows in this paper.

(b) *Current Sentencing Practices*

Given the experience with Part XXI of the Criminal Code, one might suspect that some offenders that would otherwise be dealt with under this legislation are in fact adequately dealt with within the context of the ordinary sentence structure. This possibility, which arises from the high maximums possible under the Criminal Code for most offences,⁵⁵ is borne out by reported cases.

Courts have not hesitated to impose or uphold a sentence of life imprisonment because the accused is either dangerous or likely to commit further offences from which society must be protected.

The English Court of Appeal has held:⁵⁶

A sentence of life imprisonment is justified when (1) the offence or offences are in themselves grave enough to require a very long sentence; (2) it appears from the nature of the offences or from the defendant's history that he is unstable and likely to commit such offences in the future; and (3) if the offences are committed the consequences to others may be specially injurious, as in the case of sexual offences or crimes of violence.

In that case a life sentence was upheld for an accused convicted of rape, burglary and other assaults on women.

The Court of Appeal for Ontario has indicated:⁵⁷

In order to justify a life sentence, mental disease or other abnormalities of the accused need not be shown. A life sentence may be appropriate where it is demonstrated, without anything further, that the record and evidence disclose a continuing danger to the public from the convicted person;

and further:⁵⁸

When an accused has been convicted of a serious crime in itself calling for a substantial sentence and when he suffers from some mental or personality disorder rendering him a danger to the community but not subjecting him to confinement in a mental institution and when it is uncertain when, if ever, the accused will be cured of his affliction, in my opinion the appropriate sentence is one of life. Such a sentence, in such circumstances, amounts to an indefinite sentence under which the Parole Board can release him to the community when it is satisfied, upon adequate psychiatric ex-

amination, it is in the interest of the accused and of the community for him to return to society.

In the latter case a sentence of twelve years on a charge of rape of a fourteen-year old girl was varied to life imprisonment on the accused's appeal from sentence.

In *Regina v Head*, the Saskatchewan Court of⁵⁹ Appeal refused to interfere with a sentence of life imprisonment imposed on the accused for the rape of a young girl.

The Court held:

If the offender is one for whom reformation is beyond question, then the public can be protected only by depriving him of his freedom.

In the present case, the psychiatric evidence is that the appellant is likely to repeat this type of offence, particularly if he consumes any alcohol. That being so, the prime factor to be considered in determining the appropriate sentence is the protection of the public. Clearly, under the circumstances as outlined, the public must be protected from any further similar act by this appellant. This can only be accomplished by keeping him in custody until such time as it can be reasonably certain that it is safe for him to be at large. The sentence imposed by the learned trial Judge did accomplish this . . .⁶⁰

In some cases established principles of sentencing may preclude the imposition of a sentence warranted by unusual considerations. Thus, the interests of uniformity may preclude the imposition of an admittedly longer sentence on ". . . a young man who is developing a clear pattern in the field of deliberate violence [and against whom] . . . [s]ociety must be protected . . .",⁶¹ and necessitate reduction of the sentence on appeal.

Treatment objectives are acknowledged as a very real consideration in determining sentence and sentences otherwise appropriate will be reduced to take cognizance of these.⁶² However, it is generally considered inappropriate to pass a sentence longer than the facts warrant in order to enable the offender to undergo treatment in prison, but there is no objection to calculating the length of sentence of imprisonment by reference to the duration of treatment or training programmes when the sentence is within the limits appropriate for the offence.⁶³

While the ingenuity of the sentencing judge may well be taxed in determining the appropriate course of action and the combination of dispositions available under the Criminal Code that would be appropriate,^{63A} nevertheless the reported cases make clear that in current sentencing practices Courts are already very much alive to the relevant considerations.

An important implication flows from the foregoing: that it is arguable that in the absence of special legislation for the disposition of dangerous offenders, the courts are presently capable, at least in theory, of deal-

ing with the problem. This will be raised again later in the survey of possible special sentencing structures for dangerous offenders.

(c) *Federal and Provincial Mental Health Legislation*

There also exists another legal framework comprised of an untidy product of federal and provincial statutes⁶⁴ which presently accounts for a sizeable population located at provincial mental health institutions throughout the country. At least a part of this population might be considered to be candidates for any special "dangerous offender" disposition.

The relevant legislation is the Criminal Code and the *Penitentiary Act*.⁶⁵ Under the former, one method of being channelled into a mental hospital is where an accused is found "unfit to stand trial". Section 543 of the Criminal Code provides:

A court, judge or magistrate may, at any time before verdict, where it appears that there is sufficient reason to doubt that the accused is, on account of insanity, capable of conducting his defence, direct that an issue be tried whether the accused is then, on account of insanity, unfit to stand trial.

...

Where the verdict is that the accused is unfit on account of insanity to stand his trial, the court, judge or magistrate shall order that the accused be kept in custody until the pleasure of the Lieutenant-Governor of the province is known and any plea that has been pleaded shall be set aside and the jury shall be discharged.

As a matter of practice the Lieutenant-Governor will invariably direct that the accused be kept in custody in a mental hospital.

This is of course a narrow inquiry concerned with the ability of a person to fulfill the role of an accused, and it merely postpones trial until such time as he can.

A second "channel" under the Code is the insanity defence, contained in section 16:

(1) No person shall be convicted of an offence in respect of an act or omission on his part while he was insane.

(2) For the purposes of this section a person is insane when he is in a state of natural imbecility or has disease of the mind to an extent that renders him incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong.

(3) A person who has specific delusions, but is in other respects sane, shall not be acquitted on the ground of insanity unless the delusions caused him to believe in the existence of a state of things that, if it existed, would have justified or excused his act or omission.

(4) Every one shall, until the contrary is proved, be presumed to be and to have been sane.

Under section 542(2), an accused "acquitted" by reason of insanity is detained pending the pleasure of the provincial Lieutenant-Governor,

which again will mean a mental hospital of varying security.

Finally, under section 546 of the Code:

(1) The Lieutenant-Governor of a province may, upon evidence satisfactory to him that a person who is insane, mentally ill, mentally deficient or feeble-minded is in custody in prison in that province, order that the person be removed to a place of safe-keeping to be named in that order.

(2) A person who is removed to a place of safe-keeping under an order made pursuant to sub-section (1) shall, . . . , be kept in that place or in any other place of safe-keeping in which from time to time, he may be ordered by the Lieutenant-Governor to be kept.

Related to this is section 19(1) of the *Penitentiary Act*, which provides:

The Minister . . . [of Justice] . . . may, with the approval of the Governor in Council, enter into an agreement with the government of any province to provide for the custody, in a mental hospital or other appropriate institution operated by the province, of persons who having been sentenced or committed to penitentiary, are found to be mentally ill or mentally defective at any time during confinement in penitentiary.

A provincial-federal agreement is a prerequisite for the section to be operative, but in respect of those provinces having such an agreement this provides a further route for inmates to be channelled into a mental institution. Also, it is a route which apparently results in some cases in the detention of inmates beyond the expiration of their sentence.⁶⁶

It may be noted also that, under Section 26 of the *Penitentiary Act*, relating to the power to grant temporary absences for medical and other reasons, it is not uncommon to arrange for the transfer of inmates from penitentiary institutions to psychiatric hospitals for observation and treatment, even without the presence of serious mental disorder.

These arrangements for transfer pursuant to the *Penitentiary Act* have proven less than satisfactory. The 'per diem' costs of hospitalization are a direct charge against the federal authorities, creating a disincentive to such transfers. For reasons discussed in the Working Paper on *Hospital Orders*⁶⁷ prepared by the Commission's *Project on Sentencing and Dispositions*, the arrangement has not been attractive to the psychiatric hospitals either. One important question that arises concerns who has responsibility for decisions concerning the offender on transfer. In one sense he is under the control of the hospital for purposes of observation and treatment; in the other, he remains the custodial responsibility of the penitentiary. In cases, for example, where the hospital proposes to utilize trial releases of the subject into the community as it does routinely with other "patients", the two sources of authority come into conflict. While this question is beyond the scope of this present discussion, the point is important to note here because it has significant implications for

any program designed to utilize psychiatric resources for the treatment and prerelease planning of special offender groups such as those considered in this paper.

Earlier in the criminal process the psychiatric remand possible under both the Code and provincial mental health legislation can serve to re-route an offender temporarily in preparation for a later finding of unfitness or insanity.

The Criminal Code contains three such sections. Under section 465(c) a justice upon the holding of a preliminary enquiry may

(a) remand an accused by order in writing, to such custody as the justice directs for observation for a period not exceeding thirty days where in his opinion, supported by the evidence of at least one duly qualified medical practitioner, there is reason to believe that

(i) the accused may be mentally ill, or

(ii) the balance of the mind of the accused may be disturbed, where the accused is a female person charged with an offence arising out of the death of her newly born child, . . .

Under section 543(2) and (2.1) a court, judge or magistrate has a similar power upon the trial of an indictable offence at any time before verdict or sentence. Sections 738(5) and (6) relating to summary conviction proceedings make similar provision. Recent amendments to the Criminal Code authorize such remands without the evidence of a medical practitioner "where compelling circumstances exist for so doing and where a medical examiner is not readily available to examine the accused and give evidence", and further authorize remands of up to sixty days in appropriate circumstances, supported by the evidence of a medical practitioner.^{67 a}

The powers of remand granted under provincial legislation are exemplified by section 15 of the Ontario *Mental Health Act*, which states:

Where a judge or magistrate has reason to believe that a person in custody who appears before him charged with an offence suffers from mental disorder, the judge or magistrate may, by order, remand that person for admission as a patient to a psychiatric facility for a period of not more than two months.

Finally, reference must be made to the commitment legislation current in each province that provides for commitment, both voluntary and involuntary, of persons to psychiatric institutions.⁶⁸ Such legislation may generally be invoked for the civil commitment of persons suffering from mental disorder who are "dangerous" to themselves or others.⁶⁹

There are a number of reasons why the various foregoing provisions cannot be relied upon as an appropriate vehicle for dealing with the class of offenders under discussion.

First and foremost, all are responses to the offender who suffers from

psychiatric disorder. "Dangerousness", insofar as it exists, is merely incidental to a medical condition.

The focus is different than that of the proposed provisions under consideration.

Second, use of provincial procedures may be perceived as unfairly operating against an offender to short-circuit his rights within the criminal process.⁷⁰ None of the legislation discussed purports to have a "sentence" dimension, only a psychiatric rationale, and therefore an accused loses his rights *vis-a-vis* sentencing.

To the extent that legislation is required that involves elements of both sentencing after conviction, and treatment based upon a mental disorder, a system of "hospital orders" recommended by the Project on Sentencing and Dispositions offers the same possibilities with the additional advantage of being a formalized and overt sentencing disposition controlled by the Trial Judge. The proposal is that:

When a person has been convicted of a crime which is usually sanctioned by imprisonment and that person is suffering from a mental disorder, a judge will . . . be able to sentence him to a specified term of imprisonment [and] at the same time . . . make an order that the offender be sent to a . . . psychiatric institution rather than a prison. An offender may not be detained in the psychiatric institution beyond the expiration of his sentence Treatment shall be by consent only.

In this way effect is given within the context of the criminal justice system to both the general principles of sentencing and the treatment interests of the accused.⁷¹

Further, at present all of the foregoing statutory provisions use provincial mental health institutions for their operation. Reliance thereupon pre-supposes certain answers to important issues concerning facilities and treatment within provincial institutions, and would place these matters beyond the control of the Federal Government. It is an open question whether those offenders who suffer from mental disorders that would be classified as "dangerous" under any new federal legislation, are the kind of patients whom provincial institutions would choose to admit or for which their treatment programs are geared.⁷² The requirement of custodial supervision for which provincial institutions are ill-suited is another aspect of this problem.

Finally, the foregoing legislation can do nothing with the problem of that class of "dangerous offenders" that does not suffer from mental disorders. It therefore remains necessary to consider special legislation, even if only for these offenders.

Sentencing Structure and Dangerous Offender Legislation: a Statement of the Issue

The range of dispositional choices developed within the framework of sentencing law must give full effect to a rational and consistent sentencing policy. It is therefore important to bear in mind the Commission's paper on *General Principles of Sentencing and Dispositions*, wherein it is suggested that sentencing should be based primarily on the rationales of fairness and justice in relation to the offence. Treatment requirements ought not to dictate sentencing decisions in first instance. The sentence should reflect first the gravity of the harm done, and recognize restitution and rehabilitation only within the context of such a sentence. Similar offences are to be treated more or less alike. The legitimate goals of incapacitation and individualization of the sentence are recognized, but subject to the foregoing.

Special legislation for dangerous or other offenders is difficult to reconcile with these principles. To the extent that such legislation is felt necessary, these principles emphasize the necessity for careful resolution of the problems of definition, substantive content of the disposition, review and release. A consideration of the issues raised in each of these areas may well compel the conclusion that the sum of the advantages and disadvantages or risks from such a special disposition does not outweigh the practical and theoretical drawbacks of bending these general principles.

However, the problem may also be viewed more hopefully from the other side. The inordinate length of maximum punishments possible under Canadian law has been noted.⁷³ On the assumption that any proposal for special legislation is not merely concerned with "feeding the dragon", in the hope that some symbolic (and undemonstrated) value will attach to the designation "dangerous offender" for the comfort of the

public at large, then surely dangerous offender proposals should be linked to a basic review of the maximum sentences presently authorized under the Criminal Code.⁷⁴ In other words, implementation of this specific exception to the general principles—if it is in fact an exception—would permit and even demand greater implementation of those principles in other cases.⁷⁵

If any kind of special provision for a dangerous offender group is feasible, then clearly the scheme will have to meet certain basic requirements that will now be discussed: that there be a satisfactory legislative definition of the criteria of “dangerousness” and appropriate procedures, clinical or other, for identifying those offenders who can legitimately be regarded as dangerous; that it provide essential procedural safeguards; and that it be carefully related to the overall legislative plan of sentencing provisions as a whole. After consideration of these requirements the various forms that such legislation may take, and has in fact taken in various proposals, will be considered.

Reference will be made to the different formulations in the Model Penal Code of the American Law Institute, the Model Sentencing Act prepared by the National Council on Crime and Delinquency, the recent English *Criminal Justice Act, 1967* as well as proposals put forth in California, the American Federal System and, of course, the Ouimet Committee in Canada.

Designation and Selection of Offenders of Risk

(a) *Possible Groups*

There are a number of possible groups that could be made subject to special legislative provisions, including persistent misdemeanants or habitual offenders, sexual offenders, professional criminals or participants in organized crime, and mentally ill offenders.

For example the English legislation appears to be more in the nature of a "persistent offender" than a "dangerous offender" law.⁷⁶ The Model Penal Code provisions are applicable, not only to the "dangerous offender," but also to the "persistent offender," the "professional criminal," and the "multiple offender."⁷⁷

The Ouimet Committee in its proposals for reform considered that the primary need was for legislation aimed at the "dangerous offender." It stated that such legislation should "define with as much precision as possible the criteria of dangerousness, . . . [and] . . . provide an appropriate clinical procedure for identifying a particular offender as dangerous."⁷⁸ The Committee observed: "The definition must be wide enough to encompass, for example, the emotionally disturbed person who has a compulsion to set fire to dwelling houses, the kidnapper, the person who is likely to sexually molest children by acts which, while not causing serious physical injury, may cause serious psychological damage," and at the same time "sufficiently restrictive to exclude persons who are likely to commit crimes which do not seriously endanger the person," and to exclude "the situational offender who does not represent a continuing danger."

The American *Proposed New Federal Criminal Code* provides for a "persistent misdemeanant" to be sentenced as if he were a felon if "there is

an exceptional need for rehabilitative or incapacitative measures for the protection of the public", where the accused has had at least three convictions in five years.⁷⁹ Extended terms are possible where, "having regard to the nature and circumstances of the offence and the history and character of the defendant the court is of the opinion that a term in excess of [the ordinary limits] is appropriate and desirable to protect the public because the defendant is a persistent felony offender, a professional criminal, or a dangerous, mentally abnormal offender . . . or for some other reason presents an exceptional risk to the safety of the public."⁸⁰ Another section provides for certain accused who "may be sentenced as a leader of organized crime . . ."⁸¹

Dangerous offenders constitute a primary concern, not only to the public but to professionals of all sorts concerned with corrections. There is a further reason why dangerous offender legislation demands an exclusive focus herein. While present maximum penalties under the Criminal Code may be sufficiently high to deal with these other groups at the present time,⁸² implementation of dangerous offender legislation followed by revision of the basic sentencing structure as a whole would change this. It follows that the question of dangerous offender legislation is in this sense pivotal.

The question to be considered now is by what means if any this group of "dangerous offenders" can be identified.

(b) *Identifying the "dangerous offender"*

A problem more basic than that of statutorily identifying the target group, is that of identifying the same group in practice, since this is necessary both for the purpose of devising the statutory formulation and for the purpose of subsequently applying it. This raises issues whether there are areas of expertise which might supply adequate criteria, and whether these would be sufficient for legislative formulation or some other rule-making device ancillary to a statutory formulation. Criminological typologies, clinical judgments and experience tables are the three devices most often suggested.

It should be noted that one of the tests often employed in statutory formulations, often in conjunction with others is a "treatability" test. But clearly a "treatability" test is inappropriate, because it is apparent that the legislation is directed at the untreatably dangerous equally with those for whom a "cure" is an anticipated consequence of the confinement.⁸³

(i) *Criminological data on typologies or other identifying characteristics of the dangerous offender*

Would it be feasible, as one author seems to suggest, to attempt by statute or perhaps by some rule-making process, "to distinguish varying probabilities and degrees of danger as between persons falling within generally defined categories"?⁸⁴ Perhaps—if we had available defined typologies of dangerousness. But have we? To refer to one example, Marcus and Conway feel that they have isolated fourteen factors "as a method of quantifying data so that we can *begin* to establish criteria regarding the *degree of dangerousness of the sexual offender*"⁸⁵—specifically, brutality sustained in childhood; bedwetting; fire setting and cruelty to animals; assorted delinquent acts in puberty; escalation of sexual offences; inter-related criminality with sexual offences; sustained excitement prior to the act and at the time of offences; lack of concern for victim; bizarre fantasies with minor offences; explosive outbursts; absence of psychosis; absence of alcohol consumption; high I.Q.; lack of humanitarian depth; and lack of social know-how. Each of these factors is evaluated and rated on a ten-point scale as a means of establishing a "dangerousness" score. Are these kinds of "objective factual elements" that we wish in some way to establish as a formal basis for judicial decision? The problems that any such development in legal technique would present are formidable.⁸⁶ The point can be no more than speculative because the Marcus and Conway criteria have not as yet been validated by research—indeed, there are research findings that place their criteria in some doubt.⁸⁷

In a report of a ten-year study involving 592 male convicted offenders, Kozol *et al* reported:

We conceive the *dangerous* person as one who has actually inflicted or attempted to inflict serious physical injury on another person; harbours anger, hostility and resentment; enjoys witnessing or inflicting suffering; lacks altruistic and compassionate concern for others; sees himself as a victim rather than as an aggressor; resents or rejects authority; is primarily concerned with his own satisfaction and with the relief of his own discomfort; is intolerant of frustration or delay of satisfaction; lacks control of his own impulses; has immature attitudes toward social responsibility; lacks insight into his own psychological structure; and distorts his perception of reality in accordance with his own wishes and needs.

The essence of dangerousness appears to be a paucity of feeling-concern for others. The offender is generally unaware that his behaviour inflicts suffering on others

. . .⁸⁸

Professor Cyril Greenland has suggested a typology based on a small sample of the kinds of offenders that have proven to be violent.⁸⁹ He finds four groupings:

(1) the chronic anti-social personality, characterized as anti-social with a life-style involving excessive use of alcohol;

(2) acute psychotic episodal offenders, which include some wife murders and matricide cases;

(3) situational or intermittently violent offenders, who become violent in specific situations, usually related to organic conditions of the brain; and

(4) offenders who have killed or injured their victims, usually family members, in a state of severe depression.

This typology is of course merely descriptive and it may be questioned where it assists in identifying the target group of concern or in formulating legislative categories.

In short, it does not appear anywhere in an extensive body of literature that exists that anyone has provided an empirical listing of behavioural criteria that could serve the requirement of a legislative typology of dangerousness.⁹⁰

(ii) *Reliance on clinical judgment for characteristics and release*

The reliability of clinical psychiatric judgment, especially in relation to the prediction of future criminality, has been much discussed in the literature.⁹¹ Psychiatrists with extensive experience in dealing with prisoners freely express their discomfort about the kinds of predictions that they are frequently called upon to make by courts and correctional agencies.^{91A} Of the dangerous sexual offender group, for example, a British Columbia panel of psychiatrists concluded: "The panel feel we can make certain statements regarding diagnosis, but as to prognosis—can this man adjust, contribute to society, use his potential—we are unanimous in saying that this is involving us in a great deal of speculation without accurate clinical evidence to back it up."⁹²

More frequently, one senses that the psychiatrist's discomfort occurs in cases where he wants to release an offender but feels hesitant about offering the clear-cut assurances of future conduct that are asked of him. Here, of course, he assumes a measure of responsibility for the release. However, there is little evidence that the psychiatrist's clinical predictions of probable criminality are substantially less speculative.⁹³

One problem relating to psychiatric diagnosis is that "there is often an implicit assumption that personality characteristics as ascertained by tests, interviews and other diagnostic procedures have a relationship to what the person in fact is going to do"⁹⁴—an assumption that is frequently not borne out in fact. Moreover, much inevitably depends upon the kinds of situations with which the prisoner is presented (or unconsciously seeks out) upon his release. As Sturup points out: "[H]is reaction will depend on how he experiences himself after having served his sentence. He may think of himself as a former offender. He may believe that all other people think of him as a former offender, which means that he expects that every-

one expects him to react as a criminal . . . [His] . . . choice of behaviour is . . . conditioned . . . also by situational stimuli which are dependent on other people's determined psychological experience. Thus there are important accidental factors influencing behaviour."⁹⁵

In these circumstances, the "safe" psychiatric decision is perhaps understandable. However, the problem that it creates for the prisoner is a particularly difficult one. As Brancale suggests:

Clinical criteria that point to the possibility of further dangerous behaviour cannot always be dogmatically defined. Only in clearly psychotic conditions, with a history of previous psychotically-aggressive episodes, can medical opinion find common agreement . . . An offender who is placed in further jeopardy on the basis of a clinical opinion may thus be called not only to defend his guilt, but to defend himself against the clinical findings . . . This does not minimize the importance of clinical findings, but research and experience have not brought us yet to the point where it can clearly and absolutely be indicated that certain classes of individuals will inevitably commit certain crimes.⁹⁶

Experience in both the correctional and mental health fields has shown that there is a strong tendency to "over predict" when the question of potential dangerousness is in issue. Nowhere has this been more clearly demonstrated than in "Operation Baxstrom", the celebrated mass transfer to civil state mental hospitals of large numbers of so-called "dangerous" inmates held in secure custody in the New York State correctional institutions at Matteawan and Dannemora following the successful challenge to the legal basis for such commitments by the United States Supreme Court in *Baxstrom v. Herold*.⁹⁷ Few of the 992 inmates transferred were found in fact to require secure custody, and a substantial number were in very short order released altogether or continued as "voluntary" patients.⁹⁸ This suggests that "dangerousness" is in a large part a function of the observer,⁹⁹ at least to some degree. What also seems evident, however, is the strength of bureaucratic resistance to release, especially when the future conduct of the inmate may be a possible source of embarrassment to the person responsible for initiating or approving the termination of custody. As is indicated below, this fact—and it is one that seems to be little appreciated either by the courts or by those proposing indeterminate commitment statutes—has important implications in terms of the kind of release procedures that are required for persons held in "psychiatric" custody.¹⁰⁰

To say all of this is not to minimize the difficulties of clinical prediction. Possibly the greatest of these is that of making predictions based almost exclusively on institutional performance. As the British Columbia group concluded, "it was felt impossible . . . to accurately assess, in a psychiatric evaluation, the possibility of future aberrant activities of an individual who has adapted to the environment of an institutional setting—an environment in which the stresses of community living are non-exis-

tent."¹⁰¹ Presumably this problem would be less acute with a more therapeutically oriented environment and more flexible arrangements relating to trial release and aftercare services. Still, notwithstanding the necessity of relying on clinical judgment in making release decisions within the context of sentencing powers conferred for purposes that are otherwise acceptable, it is very questionable indeed whether it is safe to rely on clinical judgment as the essential legislative basis for a system of indeterminate committal. The psychiatrist does not have the techniques of identification to warrant any such allocation of authority.

(iii) *Reliance on experience tables*

It is also questionable whether statistical prediction techniques can be looked to for a solution. To begin with, the prediction made about a single case can at best be probable, never certain. As Morris states: "Every consideration of the individual is inevitably a consideration of the ways in which, and the extent to which, he conforms to and varies from classes of people about whom we have defined experience. If our experience is ample and quantified, and if our perceptions of his similarities to and dissimilarities from these classes are precise, then we may be able to state that 'this offender belongs to a group of whom n in every hundred commit a crime of defined gravity within Y months or years.'"¹⁰² The hazards of prediction as a basis for a separate legislative categorization become evident when we consider the problem of the "false positive", and particularly the problem that it presents when one attempts to predict the "rare event". Consider, for example, the matter of prediction of violent offences on parole, as discussed by Glaser and Kenefick. The authors note that, "if a board were given all the psychiatrists, sociologists, statisticians and other experts it desired to make a thorough analysis of each case, it is doubtful if it could achieve 80 per cent accuracy in identifying the less-than-5-per cent of parolees who commit clearly violent offences after release," this being "about the greatest precision that has been demonstrated by any man or any prediction system, applied to a cross-section of prisoners, for predicting parole violation in general, rather than the more difficult task of predicting violence on parole."¹⁰³ They continue:

If a board were 80 per cent accurate in identifying the most violent parolees, they would still make more than 2 erroneous predictions in 10 as long as the violence they sought to predict occurred in less than 20 per cent of the cases. This is simply a matter of mathematics. For example, if violence were committed by 5 per cent of prison releases in every 1,000 releases, a parole board would have to identify 50 men who would commit violence among 950 who would not. With 80 per cent predictive accuracy, we could expect the board to predict violence for 20 per cent of the 950, or 190 cases, and for 80 per cent of the 50 or 40 cases. However, in this total of 230 designations as probably violent, one could not know in advance which actually would be in the 40 who would be violent. They would make a total of 200 erroneous predictions, the 190 nonviolent designated as violent and the 10 violent not designated as violent, in identi-

fyng correctly the 230 cases in 1,000 which include 40 of the 50 violence cases . . . The foregoing theoretical analysis assumes 80 per cent accuracy in predicting violent parole infractions, and that 5 per cent of the men released will commit such infractions . . . If we have 80 or even 90 per cent accuracy in predicting an event occurring in only 1 per cent of the cases, such as the commission of a violent sex offence by a paroled sex offender our ratio of errors to correct predictions would be much greater than 200 to 40.¹⁰⁴

Other reports upon attempts to set up prediction tables for violent offenders on parole indicate the problems encountered with “false positives” and the small degree of protection that the predictive method actually afforded:

Using elaborate case histories, current measures of mental and emotional functioning, and professional prognoses for a sample of 4,146 California Youth Authority wards, the present study sought to develop a classification device for estimating assaultive potential with sufficient accuracy to be useful in correctional program decisions. Simple classification procedures and multivariate approaches failed to yield an operationally practical prediction instrument that would warrant implementation in actual preventive or correctional practice. Much of the violent behaviour we would wish to predict will probably never come to our attention and the part that does will be far from a representative sample.¹⁰⁵

Silving has pointed out that the “prediction of future conduct . . . whatever might be the improvements of predictive techniques, is to a large degree uncertain, not only because of inadequacies inherent in prediction systems, but also because of the numerous potentialities of error in gathering the pertinent factual data.”¹⁰⁶ As she quite properly indicates, “[m]uch of the raw material used to determine personality factors is, in itself, very elusive.”¹⁰⁷ It is arguable, of course, that the problem of accurate factual determination is present in all judicial and clinical decision-making, and that the difficulty here is only one of degree. It should be said, however, that the courts have yet to solve the problem of evaluating statistical material introduced to establish substantive issues of the kind presented here, as opposed to matters involving broad social effects or those in which there is large scope for judicial discretion.¹⁰⁸ What is inescapable is that incorrect decisions are inherent in the prediction method itself.¹⁰⁹

Reflecting some of these very concerns, Schreiber has suggested that “[t]he *probability* that future dangerous crimes will be committed should be precisely formulated as to the requisite degree of probability and the time covered by the prediction.” He continues:

Thus, the statute could require a finding that the probability be 50 per cent or greater that the requisite future criminal acts would be committed over the next two years . . .

Thus defining those to be brought within the statutory scheme would obviously require a decision by the legislature as to how many persons society would be willing to detain in prison and for how long, when, in fact, those persons would *not* commit such crimes if released. In other words, if a 50 per cent probability were required, it would

mean that society was prepared to hold 100 individuals to prevent future crimes that 50 of them might commit.

Any [such] legislative decision . . . would be impossible to implement in practice without preparing detailed tables reflecting experiences associated with different types of offenders and the method by which they were treated . . . Only then can we say that a particular offender fits into a specified category and that a particular method of treatment will be successful.

It is arguable that at least the potential impact of error could be reduced by confining the dangerous offender provisions to persons already convicted of offences punishable by lengthy terms of imprisonment.

Tentative lists of specified offences offered by the Ouimet Committee included (with present maximum sentences added): manslaughter when caused by deliberate violence (life); attempted murder (life); robbery (life); doing anything with intent to cause an explosion with an intent to cause death or serious bodily injury or which is likely to endanger life (life); kidnapping or forcible confinement (life); rape (life); carnal knowledge of a girl under the age of fourteen years (life); breaking and entering a dwelling house when accompanied by violence against any person therein (life); arson (fourteen years); with intent to cause harm, causing bodily harm or shooting (fourteen years); buggery when committed against a person under a stated age (fourteen years); attempted rape (ten years); indecent assault on a male when committed against a person under a stated age (ten years); indecent assault of a female (five years); and gross indecency when committed with or against a person under a stated age (five years). Such a list need not include the offence of murder, because of the protection that section 684 of the Criminal Code clearly provides in requiring prior approval of the Governor in Council to any release. Nor, because of the requirement that a prisoner be *convicted* of an enumerated offence, would such provisions extend to persons found not guilty by reason of insanity.

Further, there should also be noted the potential of recidivism as a criterion. The number of previous convictions seems to be the most reliable predictor of future criminality.¹¹⁰

(c) *The problem of devising an adequate statutory definition.*

The problems with identification of the dangerous offender cannot be overstated, nor their importance over-estimated.

Who constitutes a "continuing danger" is, after all, a matter of opinion—not a definition. A definition must contain objective factual elements by which a given subject can be accepted or rejected; it must "draw lines". Of the "dangerous sexual offender" definition in the Criminal Code it has been said: "Since the definition can obviously fit, or be made to fit,

all offenders convicted of one of the specified sex offences, the real criteria for selection or rejection . . . is a function of the examiner not the examinee . . . It is drawn not by objective, scientific elements, but rather by the subjective expectations held by the particular psychiatrist, such as his own estimate of the prevalence of 'psychopathy', his allegiance to a particular school of psychiatry and . . . his estimate of his own accuracy in diagnosis . . .".¹¹¹ Surely it is not inapposite to ask, as has been asked in a somewhat related context, whether "even-handed justice" can properly be "measured out with a 'rubber' yardstick."¹¹²

To consider some examples, the definition of "defective delinquent" under the *Maryland Definitive Delinquent Act* is "an individual who, by the demonstration of persistent aggravated antisocial or criminal behaviour, evidences a propensity to criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment."¹¹³ The formulation under the Massachusetts *Sexually Dangerous Persons Law* is:

Any person whose misconduct in sexual matters indicates a general lack of power to control his sexual impulses, as evidenced by repetitive or compulsive behaviour and either violence or aggression by an adult against a victim under the age of sixteen years, and who as a result is likely to attack or otherwise inflict injury on the objects of his uncontrolled or uncontrollable desires.¹¹⁴

The *Model Sentencing Act*, s. 5(a), would authorize a "special term" where the convicted person "is being sentenced for a felony in which he inflicted or attempted to inflict serious bodily harm, and the court finds that he is suffering from a severe personality disorder indicating a propensity toward criminal activity."¹¹⁵ The *Model Penal Code* formulation (§7.03(3)) is "a dangerous mentally abnormal person . . . [who] has been subjected to a psychiatric examination resulting in the conclusion that his mental condition is gravely abnormal; that his criminal conduct has been characterized by a pattern of repetitive or compulsive behaviour or by persistent aggressive behaviour with heedless indifference to consequences; and that such condition makes him a serious danger to others." The A.B.A. Project, while deciding not to recommend specific criteria "in the belief that this is a subject on which continued debate is desirable before a firm position should be taken" expressed a preference for the Model Penal Code definition supplemented by a requirement that the court make a formal finding "that a special term is necessary for the protection of the public."¹¹⁶

The Ouimet Committee offered the following definition:

Dangerous offender means an offender who has been convicted of an offence specified in this Part [of the Criminal Code] who by reason of character disorder, emotional disorder, mental disorder or defect constitutes a continuing danger and who is likely to kill, inflict serious bodily injury, endanger life, inflict severe psychological damage or otherwise seriously endanger the personal safety of others.¹¹⁷

Are all of these “rubber yardsticks” that will be stretched or contracted by courts, psychiatrists and other decision-makers depending upon the facts of each case?¹¹⁸ If so, it may be more honest not to attempt to define any standard in the legislation. Such was the conclusion of the American National Commission on the Reform of the Federal Criminal Laws:

The major difference between this proposal and others that have been made is that it does not advance detailed criteria describing the types of offenders meant to be included within the section. The terms “professional criminal”, “persistent felony offender”, and the like, are not further elaborated upon in the statute itself.¹¹⁹

The reason for this is that an attempt to set forth such criteria is likely to become overly detailed and cumbersome and to bog down the procedural process of sentencing to a degree that outweighs the advantages of precision which might be sought. And the goal of precision is at best an elusive target. It is believed that the major advantage of the extended term idea—which is to reduce the parameters of the normal sentencing decision—can be preserved without introducing these difficulties. The hope is also that the terms will develop more precise content through the normal common law process of adjudication, and that the meaning so developed will be far more satisfactory than if statutory definitions are set forth at this point. It is of course also contemplated that appellate review of the sentence will be available in this context, irrespective of whether the general concept of appellate review in all cases is accepted. It is in the unifying and rationalizing of particularly long sentences that the appellate courts can make their greatest contribution.¹²⁰

But can any special disposition be justified in the absence of assurances of adequate means of identification, both by the statute and in fact. It has been well stated: “[d]angerous is a sprawling concept.”¹²¹ and our criminal law in all its stages has generally shunned such things. The foregoing also has other important repercussions, since the definitional elements of the legislation will greatly affect the necessary information upon which the decision will be made, the type of information and the means of providing it, whether these are set out in the statute or developed informally.

More generally, the substantive element of definition will have serious implications on all procedural aspects of the legislation. Substance and procedure are always intertwined, but especially with provisions of this nature. Questions of burden of proof, right to counsel, compulsory psychiatric examinations and release procedures, it is important to note, must be decided in the context of an accused having to defend himself against a clinical finding or an expert’s prediction, statistical or otherwise, and not merely against a legal norm having factual content.

The Custodial or Treatment Regime of those Classified as Dangerous Offenders

Another question that requires serious consideration is the matter of treatment for the dangerous offender.

The assumption is, of course, that at least some "dangerous offenders" will be detained for treatment (and conversely, that at least some will be merely 'warehoused'). The centrality of treatment is often assumed without regard to several important issues that are raised.

For example, the Ouimet Committee recommended the introduction of legislation that is "predicated upon the existence of necessary custodial and treatment facilities".¹²² The Committee followed this statement with a quotation from Guttmacher which may be taken to have embodied the spirit of the Committee's proposal:

The greatest hope for effective treatment of the dangerous disturbed offender lies in the creation of a distinctive type of correctional institution, one which is therapeutically oriented and employs specialized methods . . . At present, only the beginnings of such efforts to rehabilitate this type of offender have been made. Intensive experimentation and fundamental research are needed. The dangerous offender group comprises the most difficult treatment cases. Without treatment, the vast majority of them would continue their criminal activity. Salvaging even only 30 to 40 per cent would be a triumph and would prevent an incalculable amount of pain and misery to society.¹²³

The Committee made one final proposal. Anticipating that criminal law would be able in the future "to draw upon the resources not only of the behavioural sciences, but on those of other sciences such as biology and chemistry", the Committee recommended "that government grants be made for research devoted to the development of new and improved

methods for identifying and treating the dangerous offender.”¹²⁴

There can be legitimate concern whether such facilities would in fact be provided—witness the habitual criminal¹²⁵ and the original criminal sexual psychopath¹²⁶ provisions. One remedy might be to legislate a requirement such as appears in the Connecticut Security Treatment Center Act of 1958 that the law “shall take effect when the Commissioner . . . certifies that the Center, including the diagnostic unit, is established and is adequate to perform the function contemplated. . .”¹²⁷

Can we expect that serious efforts will be made to provide treatment? There is certainly room for doubt. One author noted in 1964 that there were only about 56 psychiatrists employed full-time in the approximately 230 adult correctional institutions in the United States, and a large percentage of these were concentrated in a few major centres.¹²⁸ Canadian Penitentiary Service figures list 23 psychiatrists employed in 1970, although almost certainly most of these were part-time staff.¹²⁹ Moreover, as Norval Morris points out, “these figures conceal the scarcity of psychiatric *treatment* resources in corrections, since most of the energies of the psychiatrists working in the correctional system are devoted to diagnosis and classification.”¹³⁰ The fact of the matter is that most programmes of this kind have been established without adequate provision for staff and—a few highly visible institutions aside—treatment has tended to become little more than an indefinite and purely custodial confinement behind bars.¹³¹

Nor is this all that is involved in implementing a treatment programme. While one may have reservations about psychiatric claims to therapeutic accomplishment, for a treatment programme to be effective a psychiatric facility must have a substantial measure of independence from control by central correctional authorities.¹³²

Further, there is the question of the very nature of the treatment programmes to be used. For are there developed treatment techniques that have demonstrable effect upon the kinds of offenders concerned? The evidence to date is that, for many such offenders at least, there are not.¹³³ In these circumstances, of course, it becomes questionable to premise preventive detention upon its treatment implications for a dangerous offender class as a whole. Preventive detention “can mean nothing more than benign and comfortable custody, which is treatment . . . [only] . . . in the sense that the patient is kept from manifesting his symptoms.”¹³⁴ But if this is the case the situation should be frankly recognized for what it is.

The moral dilemma posed by the imposition of sanctions addressed to potential future criminal conduct cannot be resolved, nor should it be “tranquilized”, merely by the use of medical labels.¹³⁵ The conscious acknowledgement of the existence of the “untreated dangerous”, not to

mention the “untreatably dangerous” is surely a necessary first step in the development of the most rational and effective legislative and administrative response.

Treatment in this context also raises issues of enforcement and controls.

The former might be judicialized by a “right to treatment” clause in the legislation. Notwithstanding the conceptual and practical problems that a “right to treatment” presents, the necessity for some such legal remedy has received increasing recognition in recent years.¹³⁶ Failing the provision of treatment adequate to the problems that led to the prisoner being dealt with under the special dangerous offender provisions, he would be entitled to a court order for release, or perhaps to consideration for resentencing on the original offence without reference to a supposed “treatment” that is promised but unproffered.

The issue of controls on treatment generally and the administration of coercive behaviour modification techniques in particular has been considered by the Sentencing and Dispositions Project elsewhere, and there it was said:¹³⁷

To avoid abuses, criteria for approved treatment programmes may well have to be devised. Such criteria should show a concern that the treatment is for a limited duration; that the treatment is fully described; and that its probability of success is explicitly set out.

...

[There must be] ... protect[ion] [of] individual choice and ... respect [for the] inviolability of the person. In particular, treatment should only be with the informed consent of the offender ...

The position taken here is that involuntary treatment is an unwarranted interference with an offender's basic rights as an individual. It is our view that conviction of a criminal offence may warrant deprivation of liberty but not deprivation or interference with other basic rights, one of which is the right not to be subjected to assaults of a medical or psychiatric nature undertaken for the prisoner's own good or for the good of the community.

These comments take on an additional urgency in this context, where “treatment” is so likely to be viewed by the public as a panacea.¹³⁸

Some Matters of Procedure

The effectiveness of any arrangement for the disposition and processing of offenders almost invariably depends upon the adequacy of the procedures that are devised to accomplish the objectives sought.

The general inadequacy of procedural aspects of the legislation to date, as well as the necessity for improvement in this respect, was the subject of comment by both the McRuer Commission which studied the sexual psychopath provisions in 1956 and also the Ouimet Committee, which studied the legislation generally in 1967.

There must be built in substantial procedural safeguards for the prisoner, such as a right to periodic assessment and review, to access to the courts on some basis to determine whether continued detention is required, and the right to counsel at court hearings. The Ouimet Committee, in addition to the foregoing, made the interesting suggestion that the court be precluded from adjudging the prisoner to be a dangerous offender where there is a negative diagnostic finding on the issue.

An accused is in a peculiarly difficult position in conducting a defence in a proceeding of this nature because he will most likely be forced to defend himself against a "clinical finding". There arises, therefore, a particular problem in regard to the burden of proof. As one group commenting on the Ouimet Committee proposals stated:

Does the Crown have to prove that an offender constitutes a continuing danger "beyond a reasonable doubt", or merely "on a balance of probabilities"? The term "likely" in the definition of "dangerous offender" seems to indicate the lesser burden of proof. Then, in all likelihood, an offender will be totally unable to adequately defend himself at trial in the face of an unfavourable diagnostic report. Even if he is able to muster the financial resources to retain expert witnesses, it is difficult to imagine how they could show that the offender does *not* represent a continuing danger (on a balance of probabilities), when the Crown has all of the resources of a large diagnostic facility to support the application. On the other hand, if the burden of proof is "beyond a reasonable doubt", then we are returned to the question: Is the degree of certainty of diagnosis

now at the level where experts can say: "This man, beyond a reasonable doubt, represents a continuing danger to society?" Can such a prediction of future human conduct *ever* be made? The Committee feels that psychiatry and related professions have not yet reached this level of competence.¹³⁹

Under the present dangerous sexual offender provisions—which require a showing that the accused is "likely" to cause a particular harm—the question of burden of proof has been little discussed by the courts, although it seems fairly clear that the "proof beyond a reasonable doubt" standard is required.¹⁴⁰

There may be a serious question whether this standard should apply in any new "dangerous offender" legislation that is substituted, either on the initial determination of "dangerousness" or in proceedings by way of review of continued confinement. The "proof beyond a reasonable doubt" standard may be considered unrealistic in the context of a clinical determination. However, a strong standard must be required and perhaps the intermediate standard of proof by "clear and convincing evidence" should be the one insisted upon.¹⁴¹

The experience in hearings involving psychiatric evidence suggests other procedural safeguards that are required and it is well to list some of these points.

(1) Any legislation should provide that the prisoner, or his counsel, should have access to all records, reports and papers of the institution relating to his case, including all psychiatric records, and should have available all additional avenues for discovery that may be necessary for the proper presentation of his case;¹⁴²

(2) The prisoner should be entitled, on request, to be examined by a private psychiatrist of his own choice, where necessary at the expense of the Crown;¹⁴³

(3) There is considerable evidence that psychiatric reports in hearings of this kind are not as complete as the seriousness of the proceedings would seem to require.¹⁴⁴ Consideration should be given, therefore, to setting out specific provisions relating to the content of the report under which the offender is "diagnosed" as a dangerous offender, including a specific requirement that any dissenting views that have been expressed by clinical personnel in the assessment process be recorded and included in the report to the court;¹⁴⁵

(4) Consideration should be given also to a provision that will ensure adequate qualifications on the part of psychiatrists rendering an opinion having such important consequences. For example, the California Welfare and Institutions Code specifies that, in proceedings on the question as to whether an accused is a "mentally disordered sexual offender", all examining psychiatrists must have at least five years' experience in the prac-

tice of psychiatry, and at least one must hold a hospital appointment.¹⁴⁶ Danish law makes provision for the appointment of a Medico-Legal Council of senior psychiatrists, to which the courts and government agencies can refer for review of psychiatric reports submitted in the first instance.¹⁴⁷ In view of criticisms that have been made of psychiatric examinations in cases of this kind it may be well to ensure that some such control is established.

A power to remand in custody "to a diagnostic institution . . . for diagnosis and assessment before imposing sentence"¹⁴⁸ may serve to remove the most objectionable aspects of psychiatric testimony as it is now frequently given in dangerous sexual offender proceedings.¹⁴⁹ However, the specified period that may be ordered must not be too long. The usual period of remand in statutes of this kind is three months, in some cases subject to extension upon application.¹⁵⁰ The Ouimet Committee recommended the power to remand the offender in custody to a diagnostic institution for a period not exceeding six months for diagnosis and assessment before imposing sentence.¹⁵¹ There is serious doubt as to the desirability of leaving the prisoner's status undetermined for such a lengthy period of time. This comment has reference primarily to the psychological effect on the prisoner, although presumably it would be necessary to settle also the question as to whether this period of time should count against sentence in the event of a negative finding on the dangerous offender issue, with the consequent implications in terms of statutory and earned remission.¹⁵² Moreover, one can foresee a number of potentially serious difficulties arising in relation to the status of the inmate in the diagnostic centre itself. Is he a prisoner under sentence? During his stay in the diagnostic facility, will he stand in jeopardy of future proceedings? The self-incrimination aspect of the question has already surfaced in the case law on the existing dangerous sexual offender provision,¹⁵³ and the issue is by no means an easy one.¹⁵⁴ Still another danger arising from a suggestion such as made by the Ouimet Committee is that the psychiatric centres to be used will become overburdened with diagnostic referrals. Again the issue must be addressed as to whether the psychiatric centres will have control over their own intake. A direct sentence to a psychiatric centre presents problems for the institution.¹⁵⁵ Having regard to the necessity for selective intake, and to the difficulties presented by the status in the penitentiary system of the prisoner thought to be a dangerous offender, one solution to the problem of securing an assessment from Canadian Penitentiary Service institutions would be a provision along the lines adopted for the United States Bureau of Prisons, where the law provides:

If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereon. The

results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation . . . or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment and commit the offender under any applicable provision of law. The term of the sentence shall run from date of original commitment under this section.¹⁵⁶

A final point—and it is a crucial one—concerns procedures for release. One wonders, notwithstanding the present section 694 of the Criminal Code, about the wisdom of an automatic yearly assessment and review by the Parole Board as suggested by the Ouimet Committee for an offender who by reason of the gravity of the threshold offence, is unlikely to receive a favourable recommendation for parole in the early stages of his confinement. There is considerable opinion that the continuing experience of parole rejection that such a procedure inevitably brings with it creates an increasing sense of frustration and desperation in the prisoner that has serious adverse effects in terms of his prospects for rehabilitation.¹⁵⁷

As a further procedural safeguard, the Committee recommended that a person sentenced to preventive detention “be entitled to have a hearing every three years before a superior, county or district court judge or judge of the sessions of the peace, for the purpose of determining whether he should be further detained or his sentence should be terminated if he has been released on parole.”¹⁵⁸ At the hearing, the offender would have the right to be present, to present evidence, to cross-examine witnesses, and to be represented by counsel, to be provided for him if necessary. The report and recommendation of the Parole Board would be available to the court. On the hearing, the court would have the power to: terminate the sentence, when the offender had prior to the hearing for a suitable period been released on parole; remand the application to a diagnostic facility for further assessment, and make such further order as deemed appropriate; or refuse to make any order at that time. By way of criticism, it is arguable that such procedures for judicial review may well be perceived as unfair by other long-term prisoners who do not have the same right to triennial “appeal”¹⁵⁹

Further, there is considerable evidence from studies that have been done of the process of application for release by persons held on psychiatric grounds in both mental hospitals and correctional institutions that it is extremely difficult for an inmate to persuade a court or board to authorize release in the face of a negative recommendation from the institution concerned.¹⁶⁰ This has often proved to be the case even where the basis of the institution’s position has been highly suspect in relation to the criteria for committal as defined by law.¹⁶¹

For reasons that have already been outlined, the institutions for their part may be quite hesitant about courting the embarrassment of releasing inmates who *might* prove to be dangerous. Institutional considerations generate “over prediction”—if for no other reason than the fact that clinical assessment is so uncertain.¹⁶² Herein lies one inherent danger of justifying longer terms of confinement on the ground that parole is available to reduce the actual period of time that will be served in institutional custody.

There is a strong case for saying, therefore, that if adequate protection is to be given to preventive detainees through commitment review procedures, this can only be accomplished effectively by placing the burden on the institution to establish affirmatively—and, at least by “clear and convincing evidence”—that a prisoner should be retained beyond a period of time prescribed by law.

And without readiness by the courts to release, any proffered review may become, in fact, little safeguard at all.¹⁶³

Alternative Models for Dangerous Offender Legislation

Having considered the basic questions applicable to any proposal for such special provisions, the question now remains: if the present Part XXI provisions are repealed, what are the alternative sentencing structures possible for the disposition of dangerous offenders.

One possibility—and it has eminent support—is to do nothing, leaving the problem to be dealt with in the context of the ordinary sentencing structure. The greatest support for this approach derives from the difficulties in identifying the target group. As well, the discussion of general sentencing principles earlier indicates that in such a case the courts would in general be capable of dealing with the problem.

One authority has argued:

Whom shall we trust? Our reply, for the time being is: Nobody ... Within the ambit of power defined by other purposes, mostly retributive, we must frequently relate sentences and parole decisions to our best judgments of the offender's dangerousness; but we should not rely on such inadequate judgments to increase our power over him, to raise the limits of punishment ... [T]he central policy issue ... [is] ... what *degree of risk* should the community bear in relation to the countervailing values of individual freedom? ... [H]ow many "false positive" predictions ... are justified for the sake of avoiding the "true positive" predictions? This is a sociolegal question, not one within the psychiatrist's particular competence. We cannot, however, even reach that question, let alone answer it, until psychiatry has more amply contributed the data within its competence relevant to posing the question for diverse categories of offenders.^{163 a}

Another has stated:

As you know, the problem concerning dangerousness is that persons who could generally be considered as aggressive do not proceed to dangerous behaviour because there is sufficient awareness and control, whereas, on the other hand, persons who are generally mild and passive may under given circumstances explode. The overwhelming impression from our study of the hundred homicide cases in Penetang was certainly in this direction. It is true that there are a few isolated cases in which a statement of dan-

gerousness could be made with a high probability that the person would act out, but those are cases in which there is no problem anyway because the behaviour clearly shows that constraint is needed. In the majority of other cases, however, there would definitely be a tremendous amount of over-prediction. . . . It is on this basis that I felt that the act should speak for itself like any other criminal act, and if an offence indeed has elements of personal harm, then it seems to me that the sentence structure, as it is, should be able to take care of the need for institutional constraint.¹⁶⁴

Another argument for this approach arises from the detrimental effects of merely creating a special status—the effect of stigmatization. One commentator has pointed out¹⁶⁵ that stigmatization (or labelling) can have three effects: the allocation effect, whereby offenders who have been convicted of a certain kind of offence are more likely candidates for further police contact; the normative effect, whereby a special group tends to be “placed together”, both physically within facilities and psychologically in the perceptions of other persons; and the interaction effect, whereby such labelling may force an offender to in fact adapt the external perceptions of him involved in the special label.

The second and third effects may be the most relevant here, since they may suggest the danger of such offenders in fact becoming more dangerous from the very process that seeks to incapacitate them.

If this alternative is rejected, then the feasibility of other possible special provisions for a dangerous offender group must be examined. Clearly the scheme will have to meet the basic requirements that have been discussed: that there be a satisfactory legislative definition of the criteria of “dangerousness” and appropriate procedures, clinical or other, for identifying those offenders who can legitimately be regarded as dangerous; that it allow for the various procedural difficulties that have been outlined; and that it be carefully related to the overall legislative plan of sentencing provisions as a whole. It would appear that the scheme would have to take one of the following forms: (1) a life indeterminate measure of preventive detention; (2) a restricted form of “extended sentence”, conceptually related in some manner or degree to the sentence that might otherwise have been imposed; (3) a “special term”, unrelated to the sentence that might otherwise have been imposed; or (4) the imposition at the end of a sentence for a specific offence of a special preventive detention measure, either up to a fixed maximum or for one or more short periods of time.

(1) *A Life Indeterminate Measure of Preventive Detention*

This is the type of disposition existing under present Canadian Law in Part XXI of the Criminal Code. It is also the proposal of the Ouimet Committee, which made it expressly “predicated upon the existence of necessary custodial and *treatment* facilities appropriate for this class of offender.”¹⁶⁶ Its rejection in principle is recommended for reasons to be suggested.

The classic social defence rationale for the indeterminate sentence has been concisely stated in an appendix to the leading case on the *Maryland Defective Delinquent Act*: "The indeterminate sentence can be an incentive to treatment and rehabilitation of inmates, having therapeutic value in and of itself by motivating some patients to become amenable to treatment and making clear to all patients that they must participate in the treatment process in order to become helped and released."¹⁶⁷ However, as the author of one study of the actual impact of the indeterminate sentence upon prisoners has observed, the "assumption that the indeterminacy of duration of sentence enhances its rehabilitative function has been derived mainly, it seems, from theoretical speculations."¹⁶⁸ There is, in fact, considerable evidence that the fully indeterminate sentence is basically destructive of rehabilitative objectives. Prolonged imprisonment with uncertain prospects of release has been known to cause a deterioration in the personality of the offender in the form of prison-induced psychosis. Some of these very concerns are reflected in the *Model Sentencing Act*, in which the indeterminate sentence is rejected on the stated ground that "[a] life term, even though the offender is subject to release, is a psychological set against any treatment other than the passage of time."¹⁶⁹

A study of the actual impact of the indeterminate sentence on prisoners at the celebrated California Medical Facility at Vacaville has led one author to this conclusion:

. . . [t]he actual function of the indeterminacy element is not necessarily related to the way in which it is perceived by the prisoners. They do not automatically accept the implication that their own efforts can affect their release date for they impute their own symbolic meaning to the power-invested in the Board. . . . Because the inmates come before the Board for a yearly review and evaluation, and therefore nearly all have experiences of a 'denial', their sense of injustice and their anger towards this authority is constantly reinforced.

The hope that is built up between appearances, followed by denial, places a heavy strain on the inmate's psychic equipment. Thus, this procedure does seem to make the inmate more prone to feelings of resentment and defiance concerning his sentence, than a fixed term; as it necessitates a constant readjustment to disappointment, or a blanket-assumption of injustice and unfairness from the beginning . . . [This] . . . does not bear any direct relationship to the 'unfairness' of a decision, since the experiences of being denied tend to trigger off unconscious hostility related to their experiences of rejection. . . .

An additional crucial factor which seems to operate against the rehabilitative incentive assumed in the indeterminate element, concerns the time factor itself. In a situation where a time perspective is indefinite, the waiting can . . . constitute an intolerable psychological burden. The need of the individual to perceive experience in a definite way, as having a beginning and an end is fundamental to human existence, and provides a frame of reference and an anchorage for the whole process of living . . . For the individual who is burdened with emotional problems and who has not attained some inner harmony, time and waiting can be a particularly fearful business.

It is clear, therefore, that the use of the indeterminacy element even when combined with the treatment-oriented organization of an institution such as Vacaville, will

not, of itself, ensure that the inmates will feel an incentive towards some change in their behaviour.¹⁷⁰

This is typical of a considerable literature criticizing the indeterminate sentence on treatment, ideological and other grounds.¹⁷¹ It is not appropriate to take as models the much publicized indeterminate sentence programmes for sociopathic, "emotionally unbalanced", and other offenders similarly characterized, that have been developed at places such as Herstedvester in Denmark, the Van der Hoeven Clinic in the Netherlands, or Patuxent in Maryland. In Denmark, sentences on the whole are quite short. The average detention time in Herstedvester itself has been reported at less than two and one-half years, with only 1 in 10 offenders remaining in custody after ten years.¹⁷² It is unlikely that such experience would be obtained in Canada.¹⁷³ In the Netherlands an offender can be "placed at the disposal of the Government" only after his sentence has expired—a procedure that has disadvantages as employed in the Netherlands, but one that at least serves to remove the initial sense of unfairness and also to make more plausible the claim that what has been imposed is, in fact, a "measure" rather than a punitive sentence for the specific crime.¹⁷⁴ Van der Hoeven, it should be added, is a private institution retaining control over its own intake. It is true that in Maryland a "defective delinquent" is sent on indeterminate committal directly to Patuxent for "confinement and treatment"—with this difference, that the procedure is a "civil commitment". But few inmates have been released from Patuxent, and the success rate for those who have does not inspire confidence.¹⁷⁵ The first director at Patuxent has himself observed that committal to a penal institution under extended sentence might well be preferable to the present system: "Treatment at Patuxent would be a bonus for which . . . [a prisoner] . . . would strive, since it would be the best means of securing early release. This would have certain advantages for the Institution, in that it would no longer be necessary to keep in the Institution cases that after trial period, have shown no interest in treatment . . ."¹⁷⁶

Further, so far as treatment considerations are concerned there appears to be no evidence supporting the necessity of such a term. Before such a measure is imposed surely present psychiatric practice in correctional institutions should be examined to ascertain the length of time that present treatment programmes involve inmates. Some clinicians have informally expressed the idea that if an offender cannot be "changed" in one year then he can never be changed.¹⁷⁷ And the concept of a long sentence for the purpose of treatment is self-defeating because clinicians are not prepared to "cure" an inmate unless he has some prospect for release, whether on parole or otherwise. Therefore, they wait for the approach of the completion of a long sentence before even commencing treatment.¹⁷⁸

Therefore, if clinicians themselves are demonstrating they require or

can legitimately demand in the large majority of cases only a certain period of time, is there any justification for the law to impose a life term?

Further, there is involved the following conceptual inconsistency. If the treatment rationale will prevail, then this special group will presumably undergo treatment commencing upon committal and they will be released upon completion of the treatment. The foregoing indicates that treatment alone would, in a majority of cases, require a much shorter time than the gravity of the offence might warrant, so that the sentences for the preventive detention group will be considerably shorter than for those imposed for serious offences in the ordinary way.

So far as treatment considerations are concerned, therefore, the case for the fully indeterminate sentence is not proven. That it can be justified on moral, ideological, or even practical grounds, is a dubious proposition at best.

As far as custodial considerations go, again the case for the indeterminate sentence has not been made out. For example, the Ouimet Report contains the assertion that a fully indeterminate sentence is necessary because "a person who has received a very long definite sentence, say 20 years, may in fact be more dangerous at the expiration of his sentence and return to freedom than when he was sentenced."¹⁷⁹ The *Model Sentencing Act* provision, on the other hand, is premised on the judgment that "violent action is a characteristic of the young rather than the old offender," so that a long definite sentence—under its provisions, thirty years—"would be ample, in almost all cases, to confine him until that period of his life when release would be safe and rehabilitation likely."¹⁸⁰

Although it is not conclusive, there is evidence from some studies that criminality, especially in its more aggressive forms, tends to abate with age.¹⁸¹

The important thing is to recognize the life indeterminate sentence as the drastic measure that it is, and that it cannot at present be justified.

(2) *An Extended Sentence, Conceptually Related in Some Manner to the Sentence that Might Otherwise Have Been Imposed.*

Recent legislation in England is based on the "extended sentence" concept,¹⁸² and it has been the subject of severe criticism.¹⁸³

The Model Penal Code provisions also adopt this approach.¹⁸⁴ They provide for a coherent scheme of minimum and maximum sentences related to the gravity of certain broad groups of offences, combined with a system of "extended sentences" for those classes of offenders, including the dangerous, who are considered to require longer periods of imprisonment.¹⁸⁵ If the offence were one in the first degree, the offender

would be subject to a minimum term fixed by the court of one to ten years, and to a maximum term fixed by law of life imprisonment. Where an extended sentence is ordered, the minimum would be increased to a ten to twenty year range. If the offence were one of the second degree, the respective terms would be from one to three years minimum to ten years maximum—increased, on an extended sentence, to from one to five years minimum to a maximum set by the court of from ten to twenty years.

The National Commission on Reform of Federal Criminal Laws has also proposed a system of extended terms, based upon the Model Penal Code proposals, in its Study Draft of a New Federal Criminal Code.¹⁸⁶

Recent proposals put forward by the California Joint Legislative Committee for Revision of the Penal Code take this approach.¹⁸⁷ With reference to extended sentences, they reflect the judgment that the imposition of a longer term of imprisonment at the time of sentencing is justified for dangerous offenders, provided that the criterion of dangerousness is relatively specific and the terms of imprisonment imposed is kept within reasonable limits. Under the Legislative Committee's larger proposals, sentencing courts will impose maximum terms of imprisonment only. Ordinary terms will be up to a maximum of life imprisonment for a felony of the first degree, up to ten years for a felony of the second degree, and up to five years for a felony of the third degree. Provision is then made for an extended term, to a maximum of fifteen years of imprisonment for persons convicted of a felony of the second or third degree, who are "persistent offenders", "multiple offenders" or what might be designated "dangerous prisoners". The definitions of "persistent offender" and "multiple offender" both incorporate an element of "dangerousness". The section relating to those two classes provides as follows:

Section 207. Criteria for Sentence of Extended Term of Imprisonment. The court may sentence a person who has been convicted of a felony of the second or third degree to an extended term of imprisonment if it makes a finding *incorporated in the record* that his commitment for an extended term is necessary for protection of the public, on either of the following grounds:

- (1) that the defendant,
 - (a) has previously been convicted of two or more felonies committed at different times when he was over the age of sixteen; and
 - (b) has on the present occasion been convicted of a felony under circumstances which created a danger of death or serious bodily injury to others or which involved sexually aggressive conduct toward children; and
 - (c) was over twenty-one years of age at the time he committed the offence for which he is now being sentenced; or
- (2) that the defendant,
 - (a) has been convicted under a judgment of conviction which includes two or more felonies,
 - (i) whose maximum aggregate sentences exceed fifteen years,
 - and
 - (ii) which were committed under circumstances which created a danger of

death or serious bodily injury to more than one person or which involved sexually aggressive conduct against more than one child; and
(b) was over twenty-one years of age at the time he committed the offence for which he is now being sentenced.

(3) *A Special Term, Unrelated to Possible Sentence*

The *Model Sentencing Act* and the American Bar Association Project opt for this alternative.

The Model Sentencing Act prepared by the National Council on Crime and Delinquency provides for a general system of judicially imposed sentences not exceeding a maximum of five years, but qualified by a provision that makes it possible to classify a prisoner as a “dangerous offender” according to specified criteria and to sentence him to a period of imprisonment of up to thirty years.¹⁸⁸

The American Bar Association Project reported:

The Advisory Committee has . . . concluded that the authorized sentence for most felonies should be in the five-year range. Such a sentence is adequate for the vast majority of offenders who will be processed through the system. There may be some cases, it is conceded, where the term should perhaps be raised to ten. Armed robbery may be one. And finally there may be some very few offences—murder is the only example on which the Advisory Committee can unanimously agree—where the authorized sentence should exceed ten years.

. . . A more realistic structure for the ordinary case, the continual focus on criteria designed to distinguish the exceptional cases, the increased visibility which such a process will necessarily have and a movement toward the articulation of reasons for a severe prison sentence should each substantially contribute to a solution to the problem.

. . . The Advisory Committee is thus attracted to a sentencing structure which states its limitations in terms more responsive to the needs of the vast majority of cases, and which authorizes a special term as an outlet for the exceptions. . . . [T]he Committee would propose maxima in the range of five years as an adequate limitation for the majority of offenders, supplemented by a special term which should not exceed twenty-five years in any case . . .¹⁸⁹

(4) *Preventive Detention Measure at End of Sentence Imposed*

Basically, two forms of post-sentence preventive detention have been suggested. The Legislative Committee in California has proposed a scheme that is closely related to its recommendations relating to extended sentences. The draft section reads, in part, as follows:

208. Extended Term on Petition of Adult Authority

On petition . . . to the court . . . the court may extend his sentence to the term prescribed by Section 206 [i.e., fifteen years] if it finds that such extension is necessary for the protection of the public. Such a finding, which must be incorporated in the

record, shall be based on the grounds that:

(a) the person's record, both within and without the correctional system, reveals a clear pattern of assaultive or sexually aggressive behaviour; and

(b) there is a substantial risk that he will at some time in the future inflict death or serious bodily injury upon another,

In making such a finding, the court shall proceed upon the same basis as in an original sentencing hearing and the person shall have the same rights as any person being sentenced.

The other approach, advocated by Dession and Silving, among others, is suggested by the provisions contained in Dession's Final Draft of the Code of Correction for Puerto Rico.¹⁹⁰ It provides that, in specified cases, "a person who is serving an ordinary or extended term of corrective custody which will expire in not more than 6 months may, where he is found to be less than responsible and socially destructive and is estimated that he will remain so constituted after the expiration of such term, be subjected . . . to extraordinary custody for so long as he may remain so constituted and destructive." The draft then goes on to provide as follows:

Periodic Review. In every case wherein an extraordinary measure subject to periodic review is in effect the Department of Justice shall at least once in every two years apply to the Court for a new determination in respect of the continuance of such measure. Such application shall include a recommendation with supporting information, and shall be on reasonable notice to the respondent. Where the respondent is in custody or irresponsible the Court shall appoint an attorney as guardian ad litem for the respondent if the respondent is not represented by an attorney of his own choice. In any event the respondent shall be entitled to a full hearing on the issue of further need for an extraordinary measure and shall be entitled to be present in person as well as represented by attorney at such hearing. Failure to afford such periodic review shall automatically terminate the extraordinary measure.

The latter procedure, it may be noted, follows in its essential features the procedure employed in the Netherlands for offenders designated as "criminal psychopaths" and placed "at the disposal of the Government" for purposes of psychiatric treatment.^{190 a}

Each of these possible structures has its desirable and undesirable aspects. As noted earlier, it appears the life preventive term should be rejected.

As between "extended terms" and "special terms", the former are more consistent with the General Principles on Sentencing, being proportionate to the initial offence and confirming that treatment is a valid consideration only "within the context of a sentence which reflects the gravity of the harm done".

If a limited system of extended sentences were considered desirable, either solely or in combination with a post-imprisonment preventive detention provision, the California plan suggests a model that, with appropriate modifications, might have much to recommend it. It would be nec-

essary to review the grading of offences under the Code, as well as the various maximum sentences that may be imposed in the ordinary case. The proposed maximum term of confinement on “extended sentence” could be increased if necessary—although this is probably undesirable, having regard to the fact that the offences involved are of the second and third degree, and the essence of the “extended sentence” concept is that the special sentence must not be out of all proportion to the sentence that might otherwise be imposed. The case is strong for retaining, as the Ouimet Committee proposals do not, some multiple offence condition of eligibility. However, psychiatric criteria could be introduced as a *supplementary*-requirement—possibly along the lines of the Model Penal Code formulation.¹⁹¹ A provision for psychiatric assessment would then be required, which might take the form of a ninety-day remand or an interim sentence of the kind provided for under the United States federal system. Having regard to the advantages that may accrue from examining the subject in a prison setting, probably both alternatives should be available. Finally, it is suggested that a full hearing on the issue—including all of the procedural safeguards discussed in the previous section—should be required.¹⁹²

Proposals for a term of preventive detention imposed at the end of a prison sentence have been criticized on the ground that they have a psychologically harmful effect on the offender.¹⁹³ It is arguable as to whether this is more damaging than the imposition of a fully indeterminate sentence at the time of trial. One can conceive, however, that the possibility that preventive detention proceedings might be instituted could create a grave feeling of disquiet among portions of the inmate population generally. This objection may be fatal to any such scheme¹⁹⁴—although it should be noted that there is evidence that some prisoners are at present confined beyond the term of their sentence on grounds of alleged mental illness.¹⁹⁵

However, there are distinct advantages to preventive detention on the post-sentence model. It tends to keep separate the considerations that are relevant to ordinary sentencing decisions from those that apply in relation to preventive detention, thus reducing the likelihood that sentences will be imposed that are perceived as unjust.¹⁹⁶ The post-sentence approach helps to avoid unnecessary “double stigmatization”.¹⁹⁷ It is less open to prosecutorial plea-bargaining abuse—a practice that has been a major source of complaint about the use of the dangerous sexual offender and the habitual offender provisions of the Criminal Code.

Perhaps most important, this model recognizes the necessity for some means of identifying dangerous offenders within the prison population while they are serving their sentences.¹⁹⁸

The potential dangerousness of some offenders does not become apparent until they are observed in the prison setting—and, indeed, may develop as a response to the prison experience itself. For these several reasons, assuming the necessity of preventive detention, the imposition of the measure at the end of a term of imprisonment has much to recommend it—provided that it is carefully regulated in terms of the degree of social danger that is presented and that adequate procedural guarantees are provided.

Any of these proposed revisions can be structured so that medical-psychiatric centres will not be burdened with offenders on direct commitment who are unresponsive to treatment, and the possibility of selective intake will be retained.¹⁹⁹ This will ensure that the sentencing judge is not led to assume that treatment will follow upon court disposition, when in many cases the offender is untreatable or the treatment unavailable.

Conclusion

The criticisms made herein demonstrate that the present Part XXI of the Criminal Code has no place in a civilized law of criminal correction. Misguided conceptions of the needs of law enforcement should not continue to stand in the way of the abolition of these existing forms of preventive detention.

However, a decision as to what should eventually replace the existing provisions is one that should be made with the greatest caution. There are, as has been suggested, difficult technical problems to be resolved if we are to ensure substantial justice in an area so potentially destructive of individual liberty—problems relating to the adequate identification in law of the offender group at risk, and to the provision of procedural safeguards commensurate with the risk of wrong decisions. More than this, however, we have also to come to terms with important questions of value and of reasonable expectation concerning our peno-correctional system. The gradual absorption of psychological and psychiatric concepts into popular consciousness has brought with it a very considerable expansion of penological expectations, but it should frankly be admitted that such expectations far outstrip the record of performance. A system that assumes too much in the imposition of penal sanctions commits not only technical error; it errs also at the basic level of values, a level at which no system that seeks to have inward force can afford to be found wanting.

At this time only certain general conclusions are offered concerning any new special provisions for dangerous offenders.

First, the underlying theory of the statutory scheme should provide that a special measure would be imposed only upon those who have (a) been convicted of *specified* crimes, (b) the nature of which indicates that unless the persons are made subject to special measures beyond the ordinary sanctions of the criminal law appropriate to the offence, there is a probability that future crimes will be committed, and (c) these crimes would involve “substantial danger” to other persons. Each of these elements should be clearly enunciated in the statute.

There must be a conscious and perhaps statutory acknowledgement that what is being done is an assessment of the *probability* that future dangerous crimes will be committed, which involves consideration of the requisite probability and the time covered by the prediction. For example, the requirement could be a finding that the probability be 50 per cent or greater that the requisite future criminal acts would be committed over the next two years. Perhaps the requisite degree of probability should vary with the kind of prior crimes committed. This requires a decision by the legislature as to how many persons society would be willing to detain in prison and for how long, when, in fact, those persons would *not* commit such crimes if released. In other words if a 50 per cent probability were considered sufficient it would mean that society was prepared to hold 100 individuals to prevent future crimes that 50 of them might commit.

The *nature* of the "dangerousness" sought to be prevented must be delineated with exactness, whether physical danger or physical and psychological "danger" is included.

It must be borne in mind that this decision is, in essence, a political one which requires the striking of a balance between an offender's freedom and the protection of the community, and therefore precision is demanded.

The decision must be judicialized. Clinical reports concerning the convict's physical and mental condition should be provided for, and clinicians permitted to render an opinion as to the probable effect therapeutic treatment will have in rehabilitating the offender, and to give their prediction concerning (a) the estimated degree of probability (b) that he would commit crimes of a *specific* nature (c) within a *given* period of time (d) if released and permitted to live under *specified* environmental conditions.²⁰⁰ Clinicians should be excluded from the realm of the political decision-making. Such a limitation would remove them from the conflicting pressures to which they are exposed when requested to evaluate an individual thought to be extremely dangerous, yet regarded as untreatable.

The indeterminate sentence, which is essentially a diagnosis *now* that the individual will still be dangerous upon his release many years in the future, should not be continued.

It should be explicitly recognized that these proceedings that can result in the imposition of extended incarceration involve a severe sanction, and therefore require that the defendant be afforded substantial safeguards. Although due process requirements may place obstacles in the path of psychiatric procedures, it is a price that society must be prepared to pay in protecting itself from those who it is suggested would pose a threat of harm to it.

Periodic independent evaluation of the effectiveness of institutions and programmes and comparisons of their results with each other should be made at set intervals. This evaluation should include:—review of the effectiveness of rehabilitative approaches currently in use; an inquiry into the percentage of inmates rehabilitated and released, and their subsequent success or failure after release; and in overall evaluation of the worth of the special disposition.

Consideration should also be given, through amendment to the Criminal Records Act or otherwise, to the desirability of a provision that would allow a determination designating a person as a “dangerous offender” to be expunged, in order that there can be some opportunity to mitigate the continuing effect of the negative labelling inherent in any such designation.²⁰¹

Only in the ways outlined above can we approximate the goals of our democratic society, protecting it against dangerous offenders while safeguarding their liberty, and at the same time experimenting with viable rehabilitative alternatives.

And when all is said and done, there remains the basic question, the question as to what kinds of errors we are prepared to accept, and in what context. This is not a question of technique, but of value. The moral issue is large: can society justify the cost, in terms of deprivation of human liberty and potential injustice to those incorrectly designated “dangerous”, of what is in fact the unproven protection afforded by provisions for special preventive detention?

References

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2. *Report of the Canadian Committee on Corrections* (1969), Chapter 13. [Hereinafter cited as OUI MET REPORT.]
3. Preventive detention is defined as meaning "detention in a penitentiary for an indeterminate period". CRIMINAL CODE, R.S.C. 1970, Ch. C-34, s. 687.
4. There is a large body of critical writing in Canada and elsewhere on the habitual criminal concept. For Canadian references see OUI MET REPORT, Chapter XIII; Symposium, "The Habitual Criminal", (1969) 13 *McGill L. J.* 533; Mewett, "Habitual Criminal Legislation Under the Criminal Code", (1961) 39 *Can. Bar. Rev.* 43; Cormier, "The Persistent Offender and his Sentences: A Problem for Law and Psychiatry," (1964), 9 *Can. Psychiatric Ass'n J.* 462. English references include Hammond & Cheyen, *Persistent Criminals* (Home Office Research Unit Report (1963)); West, *THE HABITUAL PRISONER* (1963); The Advisory Council on The Treatment of Offenders, *PREVENTIVE DETENTION* (1963); Wilson "Developments in the Penal System 1954—63" [1963] *Crim. L. Rev.* 634, at 642-46. Leading American references are Rubin, *THE LAW OF CRIMINAL CORRECTION* (1963) ch. 11; Brown, "The Treatment of the Recidivist in the United States," (1945) 23 *Can. Bar. Rev.* 640; Tappan, "Habitual Offender Laws and Sentencing Practices in Relation to Organized Crime," in *ORGANIZED CRIME AND LAW ENFORCEMENT* 113 (Ploscowe ed. 1952); *SENTENCING ALTERNATIVES AND PROCEDURES* (tent. dr., 1967; American Bar Association Project on Minimum Standards for Criminal Justice) [Hereinafter cited as *SENTENCING ALTERNATIVES AND PROCEDURES*] at 160-71; See generally Morris, *THE HABITUAL CRIMINAL* (1951); *PROCEEDINGS OF QUEEN'S UNIVERSITY'S SEMINAR ON THE PERSISTENT OFFENDER* (1963). See also Dunton-Fear, "Habitual Criminals and the Indeterminate Sentence," (1969) 3 *Adelaide L. Rev.* 335.

The dangerous sexual offender provisions have begun to receive equally careful study in Canada. See Marcus, "A Multi-Disciplinary Two Part Study of Those Individuals Designated Dangerous Sexual Offenders Held in Federal Custody in British Columbia, Canada" (1966) 8 *Can. J. Corr.* 90; Marcus & Conway, "Dangerous Sexual Offender Project", (1969) 11 *Can. J. Corr.* 198; Cormier & Simons, "The Problem of the Dangerous

Sexual Offender," (1969) 14 *Can. Psychiatric Ass'n. J.* 329; Marcus, "Nothing is my number," (1969). These provisions were the subject of an earlier official inquiry: See REPORT OF THE ROYAL COMMISSION ON THE CRIMINAL LAW RELATING TO CRIMINAL SEXUAL PSYCHOPATHS (McRuer Commission, 1958) [hereinafter cited as McRUER REPORT].

A substantial critical literature has appeared in the United States: See, e.g., Rubin, PSYCHIATRY AND CRIMINAL LAW: ILLUSIONS, FIC-TIONS AND MYTHS (1965) Ch.5; Hacker & Frym, "Sexual Psychopath Act in Practice: A Critical Discussion" (1955) 43 *Calif. L. Rev.* 766; Tenney, "Sex, Sanity and Stupidity in Massachusetts," (1962) 42 *Boston U.L. Rev.* 1; Swanson, "Sexual Psychopath Statutes: Summary and Analysis," (1960) 51 *J. Crim. L. Crim. & P.S.* 215; Kozol, Cohen & Garofalo, "The Criminally Dangerous Sexual Offender", 275, *New Eng. J. of Med.* 79; SENTENCING ALTERNATIVES AND PROCEDURES 100-07; Note, "Pennsylvania's New Sex Crime Law", (1952) 100 *U. Pa. L. Rev.* 727; REPORT OF THE NEW JERSEY STATE COMMISSION ON THE HABITUAL SEX OF-FENDER (1950); Kozol *et al.*, "The Diagnosis and Treatment of Danger-ousness" (1972) 18 (*Cr. and Delinq.* 371; Boyer "A Critique of the Commitment Process Under the Massachusetts Sexually Dangerous Persons Law" (1973, as yet unpublished).

5. The *Narcotic Control Act*, R.S.C. 1970, c. N-1 makes provision in Part II for a sentence of preventive detention and a sentence of indeterminate custody for treatment for addicts. However, these provisions have never been proclaimed in force.
6. An Act to amend the Criminal Code, S. C., 1947 c. 55, s. 18.
7. 8 Edw. 7, c. 59 (1908).
8. The original English Act provided: "Where a person is convicted on indictment of a crime, . . . and subsequently . . . admits . . . or is found . . . to be an habitual criminal, and the court passes a sentence of penal servitude, the court, if of opinion that by reason of his criminal habits or mode of life it is expedient for the protection of the public that the offender should be kept in detention for a lengthened period of years, may pass a further sentence ordering that *on the determination of the sentence of penal servitude he be detained for such period not exceeding ten or less than five years* as the court may determine, and such detention is hereinafter referred to as preventive detention . . ." 8 Edw. 7, c. 59 10(1) (emphasis added). The original draft provided for a fully indeterminate sentence, but this was amended after debate in the House of Commons: See Morris, THE HABITUAL CRIMINAL (1951) at 34-41. In actual fact, most sentences of preventive detention were for considerably less than the maximum. Of 1,154 prisoners sentenced to preventive detention between 1929 and 1945, 950 received preventive sentences of 5 years, and only 49 received more than 7 years. *Id.* at 63. The Canadian Legislation, presumably in imitation of American models, provided for a life indeterminate sentence. Under the original legislation, this was a sentence of preventive detention in addition to any sentence imposed for the offence of which he was convicted: See Criminal Code and Selected Statutes 1927 including Amendments to 1952, c. 36, s. 575b. This "dual Track" system was abandoned in 1961 in favour of the "single track" system that appears in the present S. 688 of the Code. A study conducted in 1964 of habitual criminals released on parole indicated that, of 95 persons who had been sentenced to preventive detention as of that date, 34 had been released on parole:—2 in under 5 years; 2 between 5 and 6 years; 25 between 6 and 9 years; and 5 between 9 and 12 years: Miller, HABITUAL CRIMINALS

UNDER PREVENTIVE DETENTION RELEASED ON PAROLE (1964). In answer to a question asked in the House in March 1969, the Solicitor General stated that of 84 persons sentenced under the habitual criminal provisions between 1960 and 1968, 79 had been paroled, of whom 24 violated their parole, 9 of whom had been paroled again. H.C. Deb. 6379 (1969). Figures provided by the National Parole Board in 1974 list 63 habitual criminals released on parole since 1969, of whom 17 had parole revoked (2 were released again), 23 had parole forfeited (6 were released, 2 being revoked and 2 forfeited), and 20 who were still on parole. Cf. Lynch, "Parole and the Habitual Criminal." 13 *McGill L. J.* 632 (1967).

9. "The system of preventive detention established by the 1908 act was replaced in 1948 by a new "single track" form of preventive detention, imposed by the court without special consent or application by the Crown, for a term of not less than five nor more than fourteen years as the court may determine." *Criminal Justice Act*, 11 & 12 Geo. 6, c. 58, s. 21 (2) (1948). The 1908 provisions had previously been the subject of substantial criticism in the REPORT OF THE DEPARTMENTAL COMMITTEE ON PERSISTENT OFFENDERS, CMND. NO. 4090 (1932), and changes had been incorporated in a Criminal Justice Bill introduced in England in 1938. Preventive detention has now been abolished altogether in England by the *Criminal Justice Act*, 1967, c. 80, s. 37.
10. S. C. 1960-61 c. 43 ss. 33, 35-40, and S.C. 1068-69 c. 38, ss. 77, 79-80, and also s. 53 relating to proof of prior convictions. The object of the 1961 amendments was essentially fourfold:

(1) to substitute a "single track" for a "dual track" system; (2) to require a review of parole suitability annually, rather than every three years as before; (3) to remove certain evidentiary and procedural difficulties involved in establishing that a person is an habitual criminal, these relating to the time within which notice must be given to the accused by the prosecutor and to the manner in which the consent of the Attorney General to the institution of habitual proceedings could be proved; and (4) to specify more fully the grounds of appeal in proceedings under Part XXI and the powers of the Court of Appeal upon any such appeal. In essence, the 1961 amendments were intended to simplify the procedure from the point of view of the Crown. At least one of the procedural changes had significant practical import: the period of notice required before habitual criminal proceedings could be brought was changed from seven days' advance notice as it existed at that time to seven days notice before or after conviction or sentence but within three months after the passing of sentence and before the sentence had expired.

In Letkemann, *Report to the Canadian Committee on Corrections on Existing Law and Practice Related to Persons Sentenced to Preventive Detention* (1969), the author says (at page 3) citing Smith, *A Review of the Administration of Justice for the Adult Offender in the Greater Vancouver Area* (1965, MSW, Thesis, U.B.C. School of Social Work):

[In] Vancouver courts, between 1961 and October 31, 1967, 69 persons were sentenced to preventive detention as habitual criminals, 37 were found to be habitual criminals but were not sentenced to preventive detention, and a further 42 were proceeded against but found not to be habitual criminals, by the courts. This means that more persons were found to be habitual criminals in British Columbia in a period of less than seven years, than had been so found in all of Canada from 1948 to 1961 (13 years).

In an assessment of public policy toward habitual criminal legislation in Vancouver, Smith asserts that this sharp increase in habitual applications by the city prosecutor's office did not indicate a change in policy. Prior to the 1961 amendments the short period of seven days allowed the prosecutor for such application meant that there were few cases indeed where the prosecutor could proceed with the assurance that the case could be successfully prosecuted. Consequently, few such applications were made.

The amendments did not alter the fundamental conception of the law in any significant way—although this is not to say that, within the conception of this type of habitual offender statute, the “single track” versus “dual track” approaches, do not have important consequences. See Radzinowicz, “The Persistent Offender,” in *THE MODERN APPROACH TO CRIMINAL LAW* (Radzinowicz & Turner eds. 1945), 162 at 164-66. The 1969 amendments were entirely procedural.

11. Wechsler, “Sentencing, Correction, and the Model Penal Code”, (1961) 109 *U.Pa. L. Rev.* 465 at 483.
12. For a detailed review of the case law, see Boilard, “La détention préventive du repris de justice en droit criminel canadien”, (1967) 13 *McGill L. J.* 557.
13. OUIMET REPORT at 252-53. A review of habitual criminal sentences between 1960 and 1968 provides figures that are even more striking. Of 84 such sentences of preventive detention, 57 were imposed in British Columbia, 12 in Alberta, 8 in Quebec, 3 in Manitoba, and only 2 in Ontario. H. C. DEB. 6737 (1969).
14. Cormier, *supra* note 4, at 470-71. The authors add: “Of the 80 out of 184 who have not served a third penitentiary term, some are young adults imprisoned for a first or second long term, or very young adults, some still under 20, with a first or second sentence.” *Id.* at 470.
15. Letkemann comments:

The Vancouver Prosecutor's office has two persons working full-time and one part-time, on habitual criminal cases. When cases come before the court which appear to qualify for habitual proceedings, the accused's record is referred to these persons. They in turn investigate the accused's record in order to assess the particular merits of the case. Not only the required minimum of three offences, but also such matters as work record and association with other criminals are checked out. The prosecutor's office makes every effort at this stage to assure that the evidence is adequate for the habitual charge to be successful in court.

If the evidence appears to warrant proceedings, the Attorney General's consent is requested, and formal Notice of Application served the accused . . . It becomes readily apparent that the number of applications made is highly dependent on the zealotry with which the prosecutor's office pursues these investigations, and the number of staff available to make extensive investigations within the specified time limits.

Letkemann, *supra* n. 10, at page 16. At page 24 he indicates that between 1961 and the date of writing (1967) 148 cases were proceeded with (of which 106 were found by the courts to be habitual criminals), and another 174 cases were “considered but not proceeded with.”

16. OUIMET REPORT at 253.
17. Klein, “Habitual Offender Legislation and the Bargaining Process” (1973), 15 *Crim. L. Q.* 417. At pages 429-30 Klein sets out the circumstances in which according to offenders, such bargaining involving the habitual crim-

inal provisions takes place: (1) to induce the accused to plead guilty to the substantive charge; (2) to induce the accused to provide information on other criminal acts and individuals; and (3) to ensure that the accused will not return to that jurisdiction after release.

This has also been a major source of criticism of habitual offender laws in the United States. See Turnbladh, "A Critique of the Model Penal Code Sentencing Proposals," (1958) 23 *Law & Contemp. Prob.* 544, at 547; NEWMAN, *CONVICTION* (1966); Cf. Alschuler, "The Prosecutor's Role in Plea Bargaining," (1968) 36 *U. Chi. L. Rev.* 50, at 100-05.

18. The Ouimet Committee noted: "Its discriminatory application against a few offenders, from among the large number of recidivists against whom the legislation might be applied, naturally results in bitterness and feelings of injustice . . ." OUIMET REPORT at 247.
19. See, e.g., *Regina v. Hadden*, (1966) 1 C.C.C. 133 (B.C.), where an accused with a record of 14 convictions, all but one relating to vagrancy, possession of narcotics, or petty theft, was sentenced to preventive detention following conviction for stealing a can-opener (theft under fifty dollars). The Supreme Court of Canada set aside the sentence of preventive detention on the ground that the accused was not shown to have been "leading persistently a criminal life." *Hadden v. The Queen*, [1968] S.C.R. 258. It has been affirmatively held that, while the accused must have been convicted on "at least three separate and independent occasions . . . of an indictable offence for which he is liable to imprisonment for five years or more," the last conviction may be any indictable offence. *Regina v. Sneddon*, [1966] 1 C.C.C. 397 (B.C.) See also *Poole v. The Queen* [1968] S.C.R. 381, where a sentence of preventive detention had been imposed on an offender with a prior record of convictions for robbery, breaking and entering and automobile theft, following conviction on a number of counts of obtaining by false pretences, involving "N.S.F." cheques. The sentence was set aside by the Supreme Court of Canada on the ground that it was not shown that it was "expedient for the protection of the public to sentence him to preventive detention." It is noteworthy that in both *Hadden* and *Poole*, as well as several other cases, *Paton v. The Queen*, [1968] S.C.R. 341 and *Mendick v. The Queen*, [1969], S.C.R. 865, the Supreme Court of Canada divided five to four. It is also of interest that some American decisions have held that disproportion between the seriousness of an individual offence and the imposition of an habitual criminal finding violates the prohibition against "cruel and unusual punishment" in the Eighth Amendment to the U.S. Constitution. See, e.g. *Hart v. Coiner*, (1973) 483 F 2d 136. See also Rubin, *THE LAW OF CRIMINAL CORRECTION*, 2nd. ed.
20. See, e.g., *CRIMINAL CODE* S. 294 (theft over two hundred dollars—ten years); S. 313 (possession of property obtained by crime, valued at over two hundred dollars—ten years); (mischief—most cases, 5 or 14 years). See also *Narcotic Control Act* R.S.C. 1970 c. N-1, S. 3 (possession of a narcotic—upon conviction on indictment, 7 years).
21. The Ouimet Committee observed: "The average age of the 80 detainees when the sentence of preventive detention was passed was 40.4 years. The youngest was 25 years and the eldest 63 . . . These figures tend to support the conclusion that a weakness in the application of the legislation is that it appears to be most frequently applied against the offender at a time when his behaviour pattern has assumed a non-violent character." OUIMET REPORT at 248. This same criticism has been brought in regard to the imposition of longer sentences for recidivist offenders generally. See Cormier, *supra* note 4, at 467-68. This point is considered further in the discussion of

- sentencing structure. See *supra* note 8 and accompanying text.
22. Cormier, *supra* note 4, at 471-72.
 23. A "court" for the purposes of Part XXI is defined by S. 687 to include "a court of criminal jurisdiction," and thus extends, by reason of S. 2, to "a magistrate . . . acting under Part XVI." See *Loos v. The Queen* [1971] 2 C.C.C. (2d.) 49 (S.C.C.). It has been observed: "The Canadian magistrate has a broader jurisdiction to try cases and a greater discretionary power in sentencing than that given to any single lower court judge in Europe, the Commonwealth or the United States . . . Depending on the offence, a magistrate sitting alone may: sentence to life, commit to preventive detention, impose whipping or forfeiture or fines in any amount. In short, he may impose any penalty except death. No lower court judge sitting alone in any other country is given this power." Hogarth, "Toward the Improvement of Sentencing in Canada", (1967) 9 *Can. J. Corr.* 122, at 123 (1967). See also Ryan, "The Adult Court," in *CRIME AND ITS TREATMENT IN CANADA* (McGrath ed. 1965), at 136, at 165-69; Silving, "'Rule of Law' in Criminal Justice," in *ESSAYS IN CRIMINAL SCIENCE* (Mueller ed., 1961); George, "An Unsolved Problem: Comparative Sentencing Techniques," (1945) 45 *A.B.A.J.* 250, at 251-52.
 24. See the references cited in note 4. For a convenient summary of the English studies, see Peterson, "Preventive Detention in England," in *PROCEEDINGS OF QUEEN'S UNIVERSITY'S SEMINAR ON THE PERSISTENT OFFENDER* (1963).
 25. Morris, *THE HABITUAL OFFENDER* 80 (1951).
 26. The division of judicial opinion on this issue is evident in the decision of the Supreme Court of Canada in *Mendick v. The Queen*, [1969] S.C.R. 865. The accused had been convicted of theft of an automobile, and sentenced to three years imprisonment. His record showed 46 prior convictions. Of these, 27 involved possession and use of gasoline credit cards—24 related to a two-month period, and involved a total of two-hundred and forty-five dollars and ninety-five cents. Eight related to theft and use of automobiles. Only one involved a crime of violence—a conviction for robbery in 1957, for which the accused served five years of an eight year sentence of imprisonment. A sentence of preventive detention was imposed by a magistrate, and affirmed by the British Columbia Court of Appeal. It was agreed that the accused had been found to be an habitual criminal, the sole issue being whether it was "expedient for the protection of the public to sentence him to preventive detention." Mr. Chief Justice Cartwright, with four other justices concurring, allowed the appeal, stating: "[A]lthough it is impossible to say that the appellant is merely a nuisance, he does not constitute so grave a menace that the protection of the public requires that he be deprived of his liberty for the remainder of his life, subject only to the provisions of S. 666 of the Criminal Code and the Parole Act." *Id.* at 872. In this, he appeared to reiterate views expressed in *Poole v. The Queen*, [1968] S.C.R. 381, where he placed emphasis on actual "menace to society" and made a contrast with England where "the maximum sentence of preventive detention which can be imposed . . . is 14 years and . . . in the great majority of cases . . . the sentence passed . . . [has] . . . been one of eight years," as opposed to Canada where "if the sentence is passed at all it must decree imprisonment for the remainder of the prisoner's life subject to the possibility of his being allowed out on licence if so determined by the parole authorities, a licence which may be revoked without the intervention of any judicial tribunal." *Id.* at 392. Speaking for four justices in dissent in *Mendick*, Mr. Justice Ritchie stressed the existence of a Parole Board "composed of people who are ex-

perienced in dealing with criminals," the right to annual consideration for parole, and in particular whether the prisoner's return to society should be under the supervision and control that parole provides. He then stated: "I do not find any decision so far rendered by this Court which makes it plain that a sentence of preventive detention is only to be imposed on who have been guilty of repeating crimes of violence, and I can find nothing in S. 660 itself to indicate that is directed solely to the protection of the public against violence; it rather appears to me that the section is to be applied in the case of persons who have shown themselves to be so habitually addicted to serious crimes as to constitute a threat to other persons or property in any community in which they live, and for so long as they remain at large without supervision." *Id.*, at 876-77. The frequency of five to four divisions in the Court has already been noted. See also *Regina v. Tonner* (1970) 12 C.R.N.S. 259 (Alta. C.A.) affirming that the burden is on the Crown to prove the requirement of expediency beyond a reasonable doubt; *Berthelotte v. The Queen* (1971) 13 CRNS., 390 (Que. C.A.) which appears to hold contrary to the *Poole* and *Mendick* cases; *Bingham v. The Queen* [1970] 12 C.R.N.S. 133; *Regina v. Laverick* [1972] 6 C.C.C. (2d) 377 (BCCA), following *Mendick* and *Poole*.

In *Regina v. Buckler* [1970] 2 O.R. 614 [1970] 2 C.C.C. 4, an Ontario provincial court judge suggested, in a tentative way, that the "cruel and unusual treatment or punishment" clause in the *Canadian Bill of Rights*, S. 2 (b), may have some application as a guide to the court in exercising its discretion in interpreting the "expedient for the protection of the public" requirement in S. 687. See also, *Regina v. Roestad*, [1971] 5 C.C.C. (2d) 564, and *Regina v. Nadeau* [1970] 1 C.C.C. (2d) 83.

27. OUMET REPORT at 252. This same conclusion is implicit in the 1964 study, by the former executive director of the National Parole Service, of 34 habitual criminals released on parole: "The group of detainees released on parole is composed essentially of nonviolent men. (It is anticipated that this may be a characteristic of a greater part of all the group sentenced to preventive detention to date.) Only one of the 34 men released had an offence involving violence as his current conviction at the time of being found an habitual criminal. None of the group have any significant pattern of violence on their criminal record." Miller, *supra* note 8, at 4.
28. Klein, *supra*, note 17, at page 423.
29. Cormier, *supra* note 4, at 469. This same view is reflected in the special sentencing provisions for dangerous offenders in the *Model Sentencing Act* in the United States. See NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL SENTENCING ACT, s. 5 (with commentary, 1963) [hereinafter cited as MODEL SENTENCING ACT]. See also Guttmacher, "Dangerous Offenders", (1963), 9 *Crime & Delinquency* 381.
30. An Act to amend the Criminal Code, S.C., 1948 c. 39 s. 43.
31. See *People v. Frontczak*, 381 N.W. 534 (Mich. 1938); *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940). See also *People v. Chapman*, 4 N.W. 2d. 18 (Mich. 1942).
32. See Bowman & Engle, "Sexual Psychopath Laws," in SEXUAL BEHAVIOUR AND THE LAW 757 (Slovenko ed., 1965); Note, "The Plight of the Sexual Psychopath: A Legislative Blunder and Judicial Acquiescence," (1965-66), 41 *Notre Dame Lawyer* 527. See also Swanson, *supra* note 4; Tenney, *supra* note 4 at 9. By 1965, the number of states had increased to 30. See *Bowmann & Engle, supra* at 758.
33. Gold, "The Dangerous Sexual Offender: 'How Safe is Your Daughter?'" Revised (unpublished student paper, Queen's University, 1969).

34. See, e.g., Sutherland, "The Diffusion of Sexual Psychopath Laws", (1950) 56 *Am. J. Soc.* 142 (1950); Swanson, *supra* note 4. See also J. NUNNALLY, POPULAR CONCEPTION OF MENTAL HEALTH (1961) 74. Cf. Glover, "Control of the Sex Deviate", (1960) 24 *Fed. Probation* 38.
35. Gold, *supra* note 33 in part quoting Remington, "Criminal Justice Research," (1960), 51 *J. Crim. L. Crim. & P.S.* 7 at 15.
36. See 5 H.C. DEB. 5195-200, 5203 (1948). Considerable confusion is apparent in the debates:

The legislation was introduced by The Rt. Hon. J. L. Ilsley, Minister of Justice, with these words:

"... Provision is made for indeterminate sentences of not less than two years upon the trial of persons charged with certain sex offences, if these persons are found to be criminal sexual psychopaths. . ."

During second reading, the debate proceeded as follows:

Mr. Diefenbaker: "This is an endeavour by the Department of Justice to meet a class of offence *which is becoming very general*. Various suggestions have been made on how to meet it . . . One is by lengthy imprisonment . . . The other is by *psychopathic treatment* during incarceration, resulting in a change of character of the individual, or of his propensity for sexual crimes . . ."

The discussion then proceeded on whether or not the consent of the provincial Attorney General should be required before proceedings are begun, the assumption that becomes clear being that the defendant would in many cases be requesting treatment under this section, and such consent, if required, might "... very well defeat the purpose of this legislation."

"Out of this legislation, with psychiatrists receiving training, ultimately I believe this section will . . . restore many of these wrongdoers, after treatment, to a place in crime that ends only with their lives."

The Minister replied that the criticized provision was intended as a safeguard for the defendant, for whom "... the consequences are serious indeed so far as deprivation of liberty is concerned." As regards the availability of treatment facilities, he said: "I think the legislation has to *precede* the establishment of such facilities."

The definition of 'criminal sexual psychopath' was acknowledged to be derived from the Massachusetts legislation, and when faced with the criticism that Governor Dewey of New York vetoed such a bill, the Minister replied: "I do not think it was on account of the definition. . ."

Then he continued:

"Claims are made for certain methods of treatment . . . and *nothing* can be proved . . . This legislation . . . enables certain of these persons to be taken out of circulation at any rate and *to be given curative treatment* . . ."

Another Member rose, offered his support for the section as an extension of the *M'Naghten* Rule, and said:

"We know of no greater problem in crime than this one. Since we have been here, I read about some crime on a lakeshore with regard to a man and his wife, where a woman was found in water. No solution has yet been found. It is obviously one of those sex crimes about which *we understand so little*."

Another Member rose to dispute the therapeutic philosophy of the enactment:

"I do not see why we should have compassion for those men who act like brutes, who attack young children and who kill them . . . (T)hese men are a menace to society . . . monsters whom society cannot endure . . ."

He was quickly reassured by the Minister that ". . . there is no sentimentality and no relaxation whatsoever in this section . . .", and, somewhat satisfied, he concluded:

"I am not familiar with *streamlined modern law*. But according to the law I read when I was a (law) student . . . rape was classed with murder."

The section was mentioned briefly again upon third reading of the bill, and then passed.

It should be noted that only a year earlier, during debate on the Habitual Offender provision, the Minister of Justice said:

". . . (W)e are not in a position to introduce an amendment . . . prescribing preventive detention for sex offenders for indefinite periods, when we are not prepared to state for sure that we can say when they should be released again."

Yet a year later, such a law was introduced, though history records no breakthrough in psychiatric diagnosis in the interim.

37. 5 H.C. DEB. 5197 (1948). The Massachusetts statute, in turn, appears to derive almost verbatim from the 1939 Minnesota legislation. See Bowman & Engle, *supra* note 32 at 78. The 1947 Massachusetts legislation has been described as "a classic example of all that has been found objectionable in such laws." Tenney *supra* note 4, at 758. It differed from the Canadian provisions, however, in that proceedings were brought by petition for adjudication of the offender as a "psychopathic personality," without prosecution for an offence. The Canadian statute followed the less objectionable post conviction model. It is interesting to note that the Massachusetts legislation went through a series of revisions, some of them paralleling changes in our own law, and some going beyond these. The legislative history and related experience in Massachusetts provides a useful critique of the Canadian legislation. See Tenney, *supra* note 4, at 9-24.

38. McRUER REPORT.

39. S.C. 1960-61 c. 43 SS. 32 34-40. Most of the changes were of a procedural or evidentiary nature. The most important change was in the designation and description of the offenders contemplated. The term "criminal sexual psychopath" was replaced by "dangerous sexual offender," thus taking into account the wide professional and academic criticism that the former term had come to receive. See McRUER REPORT at 15 to 20; Bowman & Rose "A criticism of the Current Usage of the term 'Sexual Psychopath'," (1958) 23 *Law & Contemp. Prob.* 650, at 668-76. For policy and jurisprudential reasons, the present section replaced the offender description which formerly read: "[A] person who, by a course of misconduct in sexual matters, has shown a lack of power to control his sexual impulses and who as a result is likely to attack or otherwise inflict injury, pain or other evil on any person . . ." See McRUER REPORT at 20-40. The other change of significance was again to substitute a "single track" for a "dual track" system, removing the previous requirement that the accused be sentenced to "a term of imprisonment of not less than two years in respect of the offence of which he was convicted" in addition to the sentence of preventive detention. Not all of the Commission's recommendations were accepted. The most notable exception was recommendation 13, that: "The Criminal Code be amended to provide that every prisoner sentenced as a dangerous sexual offender have

the right to have his case reviewed every three years by a superior, county or district court judge for the purpose of determining whether he should be further detained; on such review the judge be required to hear representations on behalf of the prisoner and those in authority over him; and on the hearing the judge have power to discharge the prisoner from the sentence of preventive detention imposed on him, order that he be released on licence on such terms as may seem just, or refuse to make any order." McRUER REPORT at 130. This recommendation was taken up again by the Ouimet Committee in its "Dangerous Offender" proposals.

40. *Klippert v. The Queen*, [1967] 2 C.C.C. 319. Prior to this amendment by S.C. 1968-69 c. 38 s. 76, the section included after the words "through failure in the future to control his sexual impulses," the additional phrase, "or is likely to commit a further sexual offence." This phrase did not appear in the pre-1961 wording; nor was it in the wording recommended in the Royal Commission Report. See McRUER REPORT at 127. Klippert, after conviction on pleas of guilty to four charges of gross indecency was, upon application by the Crown, sentenced to preventive detention as a "dangerous sexual offender." His record showed conviction five years previously on eighteen charges for similar offences. The psychiatric evidence, as presented, was to the effect that the accused was a homosexual; that the ages of his partners, over 24 years of fairly active homosexual practice, had varied from mid-teens to mid-thirties; that he had obtained his partners through discreet soliciting; that his homosexual activity was likely to continue; and that he was not the sort of person who would injure or coerce persons to take part in this activity. An appeal to the Court of Appeal of the Northwest Territories against the finding that he was a dangerous sexual offender was dismissed. The Supreme Court of Canada, by a three to two decision, affirmed. The majority, speaking through Mr. Justice Fauteux, held that the object of the provisions was not "solely to protect persons from becoming the victims of those whose failure to control their sexual impulses renders them a source of danger," *id.* at 331, relying on the words "is likely to commit a further sexual offence", and the fact that violence is not an element of some of the threshold offences listed in the definition. In a strong dissent, Mr. Justice Cartwright took the view that the definition should be given the meaning "or is likely to commit a further sexual offence involving an element of danger to another person." *Id.* at 327. He observed that otherwise, "every man in Canada who indulges in sexual misconduct of the sort forbidden by S. 149 . . . with another consenting adult male and who appears likely, if at liberty, to continue such misconduct should be sentenced to preventive detention, that is to incarceration for life." He adverted as well to "the probable effect which such an interpretation would have on the numbers of those confined to penitentiaries." *Id.* at 328. The 1969 amendment struck out the words "or is likely to commit a further sexual offence"; it also purported (see S. 7), by a new S. 149A in the Code, to abolish criminal liability altogether for homosexual activity between consenting adults in private. Given the emphasis in *Klippert* on consensual homosexual activity between adults, it may be doubted that the words "is likely to cause injury, pain or other evil to any person" will be interpreted so as to refer only to offenders who are violent or otherwise present a risk of substantial harm. See e.g. McRUER REPORT at 23-24; *Carras v. District of Columbia*, 183 A.2d. 393 (1962); and *People v. Stoddard*, 38 Cal. Rptr. 407 (1964), both illustrative as to the interpretation to which the remaining phrase is open. The question as to what constitutes substantial harm may itself have about it some element of "myth." See e.g. Bender, "Offended and Offender Children," in SEXUAL BEHAVIOUR

AND THE LAW (Slovenko ed. 1965), 687. Certain procedural changes, not relevant here, were also included in the 1969 amendments.

41. The offences listed in S. 689 (1) (a) are: rape; sexual intercourse with a female under fourteen; indecent assault on a female; buggery or bestiality; indecent assault on a male; and gross indecency.
42. This list is a composite, drawn from Tappan, "Some Myths About the Sex Offender", (1955) 19 *Fed. Probation* 7 and Sutherland, "The Sexual Psychopath Laws," (1950), 40 *J. Crim. L. Crim. & P.S.* 543, at 543-44. *See also* Rubin, *PSYCHIATRY AND THE CRIMINAL LAW: ILLUSIONS, FICTIONS AND MYTHS* (1965) ch. 5. The importance of identifying "the underlying myths which seem to support such legislation in the public mind" is obviously related to the fact "that public outcry has often been the impetus behind its enactment." *SENTENCING ALTERNATIVES AND PROCEDURES* at 103. For evidence that some of these beliefs influenced the enactment of the original Canadian legislation, see 5 H.C. DEB. 5195-200, 5203 (1948) and note 36 *supra*. The A.B.A. Project concluded: "[I]n spite of the long-standing agreement of sociologists, penologists and psychiatrists that . . . [the] . . . bases for sexual psychopath legislation are unfounded, the law continues to recognize them as valid . . . The lesson, of course, is that special terms for exceptional classes of offenders should not be authorized without adequate interdisciplinary foundation. Response to public clamor . . . is not a legitimate basis upon which to build a sentencing structure." *SENTENCING ALTERNATIVES AND PROCEDURES* at 104.
43. For support for these various claims, *see generally* TAPPAN, *THE HABITUAL OFFENDER* (1951); Tappan *supra* note 42, GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* (1952) ch. 6; REPORT OF THE ILLINOIS COMMISSION ON SEX OFFENDERS (1953). Thus a Wisconsin study concludes: "[R]eports have found that total sex offences are only about 3% of the total offences reported by the police, that not more than 5% of convicted sex offenders are dangerous, that there is no general trend towards an increase in sex offences, that sex offences rarely progress to a more serious type of sex crime, and that homicide associated with sex crime is rare." Note, [1954] *Wisconsin L. Rev.* 324, at 327. A number of studies suggest that sex offenders have one of the lowest rates of recidivism of all types of criminals, and most repeaters are minor offenders such as exhibitionists and homosexuals who are seldom seriously harmful. Tappan, *THE HABITUAL OFFENDER* (1951) 14; Guttmacher, *SEX OFFENCES: THE PROBLEM, CAUSES AND PREVENTION* (1951) 17-18, 131-32. Mohr, Turner & Jerry, *PEDOPHILIA AND EXHIBITIONISM* (1964). Not all of these claims however, can be accepted without qualification. The validity of statistics on low recidivism by sex offenders have been challenged. See studies summarized by Bowman & Engle, *supra* note 32, at 769-70. Some pedophilic recidivists may be a justifiable cause of concern. Guttmacher, *supra* at 132. Cormier and Simons have pointed out that statistical studies are misleading because more serious acts appear under ostensibly non-sexual crime listings, such as murder or arson, that most dangerous sexual offenders have in fact progressive records and the extent of the problem may be greater than earlier studies have suggested. Cormier & Simons, *supra*, note 4, at 330-31. But see Mohr & Gray, "Follow-Up of Male Sexual Offenders," in *SEXUAL BEHAVIOUR AND THE LAW* (Slovenko ed. 1965) 742 at 746. In Boyer, "A Critique of the Commitment Process under the Massachusetts Sexually Dangerous Persons Law", at page 7, the author cites a study by L. Frisbie and E. Dondis of recidivism among 1,302 patients discharged from the California Sex Psychopath Program (Calif. Mental

Health Research Monograph No. 5 (1965)), which, he states, "tends to confirm that even treated sex offenders who commit offences after release commit the same type of offence for which they had earlier been convicted. About 11% of the recidivists initially convicted of the relatively minor offence of exhibitionism did however commit the more serious offences of pedophilia and acts involving sexual aggression." The fact remains that these types of offenders are rarely the ones reached by the dangerous offender legislation.

44. The Ouimet Committee noted: "The present dangerous sexual offender legislation appears to have been more uniformly enforced across Canada than the present habitual offender legislation, although it is obvious that substantial disparity exists with respect to its enforcement in different parts of Canada." OUIMET REPORT at 255-56. For example, of 57 persons in Canadian penitentiaries on February 26, 1968, sentenced as dangerous sexual offenders, 15 were from the greater Vancouver area, as compared with 4 from Ottawa, 3 from Hamilton, 2 from each of Montreal, Toronto, Edmonton, Quebec City and Regina, and 1 from Winnipeg and Calgary. See also note 51, *infra*.
45. See *supra* note 17. Also see Burick, "An Analysis of the Illinois Sexually Dangerous Persons Act," (1968) 50 *J. Crim. L. Crim. & P.S.* 254, at 256.
46. See *supra* note 8 and accompanying text. In answer to a question asked in the House in March, 1970, the Solicitor General stated that of 64 prisoners sentenced to preventive detention as dangerous sexual offenders as of February 24, 1970, 21 had been granted parole, of whom 11 had violated their parole. The average stay before release to parole had been 8 years, 5 months and 17 days. H.C. DEB. 5034 (1970). Presumably, the figures relating to average stay referred only to those who had, in fact, been granted parole. Figures provided by the National Parole Board in February, 1974, list 13 DSO's as having been granted parole since 1969, of whom 3 had paroles revoked and 2 forfeited. It is important also to understand the status of the dangerous sexual offender in the institution. The authors of a British Columbia study have reported:

Regarded with fear, contempt, and disinterest in and out of prison the dangerous sexual offender poses a problem from both the humanitarian and the practical point of view. His plight is perhaps more hopeless than that of any other prisoner, facing, as he does, the prospect of indefinite incarceration and knowing parole to be a remote or even non-existent possibility . . . The dangerous sexual offender in the prison community is a social pariah. Not only is he isolated and spurned by the population of fellow inmates, but he is subject to considerable humiliation and abuse both verbal and physical. He is known as "rapo" or "baby-fucker" and other emotionally loaded basic sexual labels, his possessions are damaged, his cell urinated in or set on fire, his person attacked from unexpected quarters . . . On occasion, some sex offenders have sought protection in a specially isolated area, used mainly for punishment, and have been voluntarily confined there for many months or years.

Marcus & Conway, *supra* note 4, at 198-99 and 201. See generally Marcus, NOTHING IS MY NUMBER (1971).

47. See *supra* note 23.
48. OUIMET REPORT at 254.
49. See Ploscowe, "Sex Offenses: The American Legal Context," (1958) 23 *Law & Contemp. Prob.* 217; SENTENCING ALTERNATIVES AND PROCEDURES at 106.

50. Guttmacher, *supra* note 43, at 131. See also Wheeler, "Sex Offenders: A Sociological Critique," (1958) 23 *Law & Contemp. Prob.* 272, at 274. Cf. Cormier & Simons, *supra* note 4, at 330-31.
51. OUIOMET REPORT at 255. Prof. Cyril Greenland is currently doing an empirical study for the National Law Reform Commission of all 78 D.S.O.'s in

Canada and comparing them with some 600 sexual offenders in penitentiaries who have not been proceeded against under Part XXI. His tentative conclusions are that no relevant differences are apparent that warrant the different treatment in law: Private communication with Alan D. Gold, November, 1973. In Greenland and Rosenblatt, *Violent Offences Against Persons Study Part II*, 1972, 19 dangerous sexual offenders in Ontario Penitentiaries were compared with a control group of 25 other sexual offenders. Only 4 D.S.O.'s (22%) were found to have previously been convicted of an offence against the person whereas of the control group 15 (60%) had been previously convicted. 11 (58%) of the D.S.O.'s and 17 (68%) of the control group had convictions for property offences. He found all D.S.O.'s and only 64% of the control group had been arrested or convicted previously for sexual offences. A higher proportion of the D.S.O.'s had chosen young males under 16 as the sex object, while the controls tended to select females over 16. Perhaps significantly "a slightly greater amount of sadistic and masochistic behaviour was reported in the sexual behaviour of controls than the D.S.O.'s".

In an earlier article, Greenland, "Dangerous Sexual Offenders in Canada" (1972) 14 *Can. J. of Crim. and Corr.* 44, Professor Greenland concluded from a study of the records of 17 D.S.O.'s in Ontario penitentiaries that the group could be divided into three main groups: 3 cases involving physical violence; 9 cases involving offensive but no violent behaviour; and 5 cases of inoffensive, homosexual pedophiles.

"It appears from this somewhat crude analysis of data on a small group of dangerous sexual offenders that only about three of the seventeen had been dangerous in the sense of seriously threatening the life or safety of others. The other men were apparently guilty of grossly offensive and indecent behaviour but were not physically violent. In view of this, the practice of sentencing pedophiles and exhibitionists to years of incarceration can hardly be justified."

(At pages 49 and 50). Similar conclusions appear in a memorandum dated December 13, 1973, prepared by Brian C. Murphy, Regional Research Officer for the Canadian Penitentiary Service, British Columbia Region, where it was noted that half of the inmates legally-defined as D.S.O.'s appear to have been convicted solely on the basis of non-dangerous types of sexual violations.

"It is also noteworthy that only 50% of the inmates legally defined as dangerous sexual offenders (DSO) had ever engaged in sexual violence, while 100% of the inmates legally defined as non-dangerous sexual offenders (NDSO) had engaged in sexual violence. No doubt future anthropologists will view this kind of decision-making by our criminal justice system as a curious cultural idiosyncrasy of our befuddled era."

52. Guttmacher, *supra* note 43 at 131 and *supra* note 29, at 382-83. This same policy judgment is carried over into the MODEL SENTENCING ACT S.S. 5 and 6.
53. In Greenland, "Violence and Dangerous Behaviour Associated with Mental Illness: Prospects for Prevention" (1971) 13 *Can. J. of Crim. & Corr.*, 331 at page 334, Prof. Greenland considered a study by Revitch of sex murders,

(Revitch, "Sex Murder and the Potential Sex Murder," (1965) 26 *Dis. Nervous System* 640):

Eight of the forty-three cases involving sex-murder and potential sex-murder, described by Revitch resulted in the death of the victims. In thirty of the forty-three cases the offenders had committed previous offences, but only three of the attacks were overtly sexual in nature. Twelve were incidents of breaking and entering. The high incidence of previous convictions for burglary rather than sex offences has also been noted by other researchers. It seems possible that an unusual history of robbery might provide useful clues for the prediction of potential sex offenders. (at page 334).

But *Cf. Kozol et al* "The Diagnosis and Treatment of Dangerousness," (1973) *Cr. and Delinq.* 371 where the authors suggest that plea-bargaining may account for the absence of sex offences in the prior records of such persons.

54. THE LAW AND MENTAL DISORDER: REPORT OF THE COMMITTEE ON LEGISLATION AND PSYCHIATRIC DISORDER, chs. 5 and 6 (Can. Mental Health Ass'n Rev. ed. 1972).
55. For example, the maximum terms of imprisonment under the code for the offences specified by the Ouimet Committee as being those for which an offender may be considered "dangerous"—albeit that the list does not purport to be exhaustive—would appear already sufficient to protect society. Of the 15 offences listed, 8 are punishable by life imprisonment, 4 by imprisonment for fourteen years, 2 by imprisonment for ten years, and only 2 by imprisonment for the lesser period of five years.
56. *Regina v. Hodgson* (1968) 52 Cr. App. R. 113.
57. *Regina v. Pion and McClemens* [1971] 3 OR 428, 4 C.C.C. (2d) 224.
58. *Regina v. Hill* (Ontario Court of Appeal, January 17, 1974).
59. (1971) 1 C.C.C. (2d) 436.
60. *Cf. Regina v. Jones* (1972) 3 C.C.C. (2d) 153; *Regina v. Bannerman* (1966), 55WWR257, 48 CR 110 (Man. C.A.).
61. *Pigeon v. Queen* (1969) 5 C.R.N.S. 381, at 384 (Que. C.A.).
62. *Regina v. Doran* (1971) 5 C.C.C. (2d) 366, 16 C.R.N.S. 9 (Ont. C.A.); *Regina v. Wallace* (1973) 11 C.C.C. (2d) 95 (Ont. C.A.); *Cf. Regina v. Doucer* [1971] 1 O.R. 705 (Ont. C.A.). See Bartholomew, "Some Problems of the Psychiatrist in Relation to Sentencing" (1973) *Crim. L.Q.* 325.
63. *Regina v. Turner* (1961) 51 Cr. App. R. 72; *See* [1973] *Crim. L. Rev.* at 709. It is not considered proper to increase the sentence by having regard to parole eligibility: *Regina v. Holden* [1963] 2 C.C.C. 394 (BCCA); *Regina v. Wilmott* (1966) 58 D.L.R. (2d) 33 (art. C.A.) However, there is strong evidence that at least magistrates in Ontario often disregard this principle: *Hogarth Sentencing as a Human Process* (1971) at 176-7.
- 63A. In *Regina V. Sadowski* (1968) 3 C.R.N.S. 269 (Ont.), The accused in a drunken brawl, had killed the woman with whom he had been living for five years. He pleaded guilty to manslaughter. A psychiatric report prepared after his committal for trial revealed that the accused was an alcoholic with a psychotic personality which could cause him to be a menace to himself and others in the future. He had no record of any conviction for an indictable offence but he had been convicted on numerous occasions for drunkenness in public places. Mr. Justice Haines of the Supreme Court of Ontario sentenced the accused to five years imprisonment and ordered him to enter into a recognizance, immediately prior to his discharge from custody, to keep the peace and be of good behaviour for a period of two years. His Lordship held that although it was desirable to sentence the accused to a short term of im-

- prisonment followed by a lifetime of parole, this was not possible without sentencing him to a long term of imprisonment which would crush the accused and might well destroy him. Faced with problems of evolving an adequate sentence for a man who was apt to engage in a life of crime, the power of a court was very limited and the present state of the law deprived the Bench and the Bar of the opportunity for useful collaboration calculated to achieve maximum rehabilitation. Code ss. 637 and 638 to some extent, enabled a court to adopt the concepts indicated but, unfortunately, limited the court's power to bind the accused over to a period of two years only.
64. This of course reflects the distinct constitutional jurisdictions in sections 91 and 92 of the *British North America Act*.
 65. R.S.C. ch. P-6.
 66. Jobson, "Commitment and Release of the Mentally Ill Under Criminal Law," (1968-69) 11 Crim. L.Q. 186.
 67. *Hospital Orders*, study paper by the Sentencing and Dispositions Project, October 1973.
 - 67a. Statutes of Canada 1972, Ch. 13, ss. 38, 44, and 63.
 68. See THE LAW AND MENTAL DISORDER: REPORT OF THE COMMITTEE ON THE LEGISLATION AND PSYCHIATRIC DISORDER (rev. ed. 1972).
 69. See, e.g. *Mental Health Act*, R.S.O. 1970, c.269, s.8(1) Any person who:
 - (a) suffers from mental disorder of a nature or degree so as to require hospitalization in the interests of his own safety or the safety of others; . . . may be admitted as an involuntary patient . . .
 70. See *Fawcett v. Attorney-General for Ontario*, (1964) 44 C.R. 201 (S.C.C.); *Re Regina and Attwood*, (1972) 8 C.C.C. (2d) 147.
 71. *Ibid*.
 72. See *op. cit.* note 67 at 179-80. For example, it appears that the Herstedvester Detention Centre in Denmark has gained support for the ordinary state mental hospitals because it has "removed the trouble-makers" who were previously sent there for lack of an alternative. Herstedvester takes all the clients from the Criminal process, thereby relieving the state hospitals: Conversation with Ole N. Jensen, Senior Psychiatrist, Herstedvester Centre by A. D. Gold, December, 1973.
 73. See footnotes 20 and 55. Prison sentences in Canada are also recognized as too numerous. Figures for the frequency of commitments to penal institutions per 100,000 for the year 1950, have been quoted as follows: Norway 44; United Kingdom 59; Sweden 63; Denmark 77; United States 200; Canada 240: Hogarth "Toward the Improvement of Sentencing in Canada", (1967) 9 *Can. J. Corr.* 122, at 124. See also Evans, *Developing Policies for Public Security and Criminal Justice* (rept. to the Economic Council of Canada, 1973) at 84-89. In regard to the length of prison sentences, Morris provides figures for Sweden in 1964 which indicate that, of 11,227 commitments, only 8 exceeded 10 years, 38 exceeded 4 years and 206 exceeded 2 years—to which must be added 692 indeterminate commitments, which ordinarily result in release in about 5 years. Morris, "Lessons from the Adult Correctional System in Sweden", (1966) 30 *Fed. Probation* 3, at 4. Danish figures are available for 1954, which show 5,542 sentences of imprisonment, of which only 4 were over 12 years, 11 over 6 years and 99 over 2 years. Mannheim, "Comparative Sentencing Practice", (1958) 23 *Law & Contemp. Prob.* 557, at 571. In England, figures for the year 1967 show 42,321 total prison sentences: 94 were for life; over 14 years—100; over 10 years—112; over 7 years—196; over 5 years—444; over 4 years—816; over 2 years—3,160. REPORT ON THE WORK OF THE PRISON DEPARTMENT,

STATISTICAL TABLES 10-11. (Home Office 1967). The average length of sentence in Britain has increased in recent years, so that 14.7% of sentences of imprisonment were in the 1 to 3 year range during 1953-62, as compared with 4.4% in 1938—although only 3% of those imprisoned still receive sentences of over 3 years. See Williams, "The Use the Courts Make of Prison", in *SOCIOLOGICAL STUDIES IN THE BRITISH PENAL SERVICES* (Halmos ed. 1965) 49. See also Radzinowicz, "The Dangerous Offender", (1968) 41 *Police J.* 411, at 443-44. Canadian figures for 1967, compiled by combining *STATISTICS OF CRIMINAL & OTHER OFFENCES* (1967) 140 and *CORRECTIONAL INSTITUTIONS STATISTICS* (1968-69) 110 (Statistical Tables on Inmates Released and Admitted to Penitentiaries, 1967-68), suggest the following totals: sentences of imprisonment—18,674; sentences for life, including preventive detention and commutations—57; over 20 years—63; over 10 years—150; over 6 years—288; over 5 years—478; over 4 years—685; over 2 years—3,016. All the figures are cumulative.

74. The Model Sentencing Act and the American Bar Association Project recommended "special terms" for designated classes of offenders—to a maximum of thirty years and twenty-five years, respectively—with the specific indication that this should be accompanied by a parallel reduction in the statutory maxima for most other offences. For data on the length of sentences imposed in American jurisdictions, see Murrah & Rubin, "Penal System and the Model Sentencing Act", (1965) 65 *Colum. L. Rev.* 1167; Tappan, "Sentencing Under the Model Penal Code", (1958) 23 *Law & Contemp. Prob.* 528; *SENTENCING ALTERNATIVES AND PROCEDURES* 56-61. The following is the discussion in the A.B.A. Study:

...The Model Sentencing Act concluded its study of sentences with the recommendation that five years was a perfectly adequate sentence for most offenders. It based this conclusion on figures which showed that during 1960 more than ninety per cent of the offenders who achieved their first release from federal and state institutions had actually served less than five years.

If such a large number of offenders are being released anyway before the service of five years, it might properly be asked why it is so important that authorized sentences be reduced to the five-year range. There needs to be provision, it could be argued, for the offender who does pose a significant public danger, if authorized sentences are too low, the public cannot adequately be protected.

The Advisory Committee would agree with the basic premise underlying this argument. There should be long sentences available in the limited context where public protection is at stake. But the fundamental error to which the argument leads is that the entire system should be structured to accommodate the unusual case. It would make far more sense to structure the system towards the offender with whom the courts have to deal most of the time, leaving an outlet which permits the special case to be treated with special provisions.

...The Advisory Committee believes that there are two major impacts of a contrary approach. The first is that the existence of legislation authorizing an exceedingly long sentence tends to drive sentences up in cases where the impetus ought to be in exactly the other direction... The second impact of such a sentencing structure is that it is one of the major causes of the much-discussed disparity problem. If the range is twenty years for an offence where most offenders who should go to prison would get less than five, the authorized range is an open invita-

tion—and the results verify the hypothesis—to sentences which irrationally spread the whole gamut of the authorized term. The result of such disparity is serious injustice and a loss of respect for the system. Increased rationality and order on the other hand—and a consequent reduction of sentencing disparities—should be the result of a structure which is basically oriented towards the usual case.

The Advisory Committee has accordingly concluded that the authorized sentence for most felonies should be in the five-year range. Such a sentence is adequate for the vast majority of offenders who will be processed through the system. There may be some cases, it is conceded, where the term should perhaps be raised to ten. Armed robbery may be one. And finally there may be some very few offences—murder is the only example on which the Advisory Committee can unanimously agree—where the authorized sentences should exceed ten years.

...

. . . A more realistic structure for the ordinary case, the continual focus on criteria designed to distinguish the exceptional cases, the increased visibility which such a process will necessarily have and a movement toward the articulation of reasons for a severe prison sentence should each substantially contribute to a solution to the problem.

...

The Advisory Committee is thus attracted to a sentencing structure which states its limitations in terms more responsive to the needs of the vast majority of cases, and which authorizes a special term as an outlet for the exceptions . . . [T]he Committee would propose maxima in the range of five years as an adequate limitation for the majority of offenders, supplemented by a special term which should not exceed twenty-five years in any case. . . . SENTENCING ALTERNATIVES AND PROCEDURES 59-61 and 84-85.

It should be emphasized that, under the A.B.A. proposals, the enactment and imposition of "special terms" is subject to a number of strict conditions, including a precise legislative statement of the criteria that must be satisfied before the special term can be imposed, with a view to avoiding the danger "that the device of the special terms will in fact be a method of increasing sentences across the board". *Id.* at 85.

The need to assess special provisions in their relation to sentencing structure as a whole is also suggested by English experience with "extended sentences". See Thomas, "Current Development in Sentencing—The Criminal Justice Act in Practice", [1969] *Crim. L. Rev.* 235 at 242-7.

75. Cf. WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, (1970) Volume II, at 1269-70: "The basic idea underlying the extended term proposal is that authorized sentences ought basically to be designed for the offender who is going to be before the courts most of the time. It is thus an attempt to avoid the distorting effect on most sentences of a sentence structure aimed primarily at the offender who will come up only a statistically small percentage of the time . . . [while] authoriz[ing] an appropriate sentence when such an offender does appear". See also Outerbridge, "Unity and Credibility in Corrections" [1970] 12 *Can. J. Corr.* 274.
76. See note 182, *infra*.
77. MODEL PENAL CODE ss. 6.06, 6.07, 7.03; (Proposed Draft 1962) See also MODEL SENTENCING ACT ss. 5 and 6.
78. OUMET REPORT at 258.
79. STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE, s. 3003.

80. S. 3202.
81. S. 3203.
82. As concluded by the Ouimet Committee: OUIMET REPORT at 264-65. The Committee's assumptions on this point are criticized in Price, "Psychiatry Criminal Law Reform" and the "Mythophilic Impulse: On Canadian Proposals for the Control of the Dangerous Offender" (1970) 4 *Ottawa L. Rev.* 1 at p. 19 f.n. 63.
83. For a discussion of the treatment considerations in such legislation, see *infra* at notes 122 to 138 and accompanying text.
84. Frankel, "Preventive Restraints and Just Compensation: Toward a Sanction Law of the Future" (1968) 78 *Yale L.J.* 229 at 242.
85. Marcus & Conway, "Dangerous Sexual Offender Project" (1969) 11 *Can J. Corr.* 198, at 204-05; as expanded in Marcus, *NOTHING IS MY NUMBER* (1971), esp. at pages 42-3 and chapter 5.
86. The jurisprudential concept suggested here has never been fully developed. There appear to be substantial elements of it in Dession's Final Draft of the Code of Correction for Puerto Rico ch. 4, *Situations Subject to Correction*, reproduced with annotations in (1962) 71 *Yale L.J.* 1062. Also relevant are the following two papers:— Mohr, "Towards Phenomenological Models of Criminal Transactions: Actus Reus Reconsidered", 1965 (unpublished paper presented at the Fifth International Criminological Congress, Montreal); Gigeroff, "Phenomenological Investigation of Criminal Offences: Its Relevance to the Legislator", 1965 (unpublished paper presented at the Fifth International Criminological Congress, Montreal). Cf., PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF CRIMINAL JUSTICE, SCIENCE & TECHNOLOGY (Task Force Report, 1963) 66; Arens & Lasswell, "Toward a General Theory of Sanctions", (1964) 49 *Iowa L. Rev.* 233. But cf., Glueck, "Principles of a Rational Penal Code" (1927-28) 41 *Harv. L. Rev.* 453.
87. See MacDonald, *PSYCHIATRY AND THE CRIMINAL* (2nd ed. 1969) 91-29.
88. Kozol *et al.*, "The Diagnosis and Treatment of Dangerousness" (1972) *Cr. and Delinq.* 371. The authors claimed reliable diagnosis and effective treatment with a recidivism rate of 6.1 per cent, based upon a 10-year study with 561 male offenders at the Treatment Centre, Bridgewater, Massachusetts. The staff's initial diagnosis indicated that 304 of these persons were not dangerous, and they were released into the community after completing their sentences. Twenty-six (8.6 per cent) subsequently committed serious assaultive (dangerous) crimes. The courts concurred in the diagnosis of dangerous in 226 cases and committed these offenders to the special "treatment" facility for an indeterminate period of one day to life. Following treatment for an average period of forty-three months, eighty-two patients were discharged on recommendation of the clinical staff. Of these, five (6.1 per cent) subsequently committed serious assaultive crimes, including one murder. Forty-nine of the originally committed patients were released by court order against the advice of the clinical staff. Of these, seventeen (34.7 per cent) subsequently committed serious assaultive crimes, including two murders. It should be noted first that no comment is made beyond a bare statement to that effect (at 392) with respect to the twenty-two false positives that were released by the courts. Secondly,
 ". . . a different approach would be to determine how many actually dangerous persons there were in the 561 originally diagnosed, and how many of these were correctly diagnosed by the Center as dangerous. But 126 of the 561 have not had much opportunity to display their dan-

gerousness, since they are still confined at the Center: and this group might be expected to contain a relatively high percentage of dangerous persons. One clue as to what that percentage might be may be gleaned from the 49 who were released by the court against the advice of the Center. Seventeen of these, or 34.7 per cent proved to be dangerous. Perhaps the same percentage of those still confined are also dangerous. It could be argued that the percentage would be higher among those still undergoing treatment, since both the Center and the court agree upon their dangerousness. But that is questionable, because the key factor in obtaining a court release against the Center's recommendation seems to be a matter of legal initiative, rather than a showing of less apparent dangerousness. Subject to these not insignificant doubts, it can be estimated that 34.7 per cent or 44 of the 126 patients still confined may actually be dangerous. Also, if treatment has any effectiveness whatsoever, it is not reasonable to say that only 5 of the 82 released after completing treatment were actually dangerous at the time of their original diagnoses. For lack of any other clue to the real number, the 34.7 per cent figure could be used again to estimate that 28 of these 82 were actually dangerous before being treated.

Adding these estimates of 44 and 28 to the recidivist figures of 26, 12, and 5 yields a very shaky estimate that 115, or 20.5 per cent of the 561 diagnosed persons were truly dangerous; and of these 115, the Center correctly diagnosed 89, or 77.5 per cent as dangerous, and incorrectly diagnosed as not dangerous 22.5 per cent of 26 dangerous men. A more alarming conclusion of this same analysis is that 168 or 65.4 per cent of the 257 diagnosed as dangerous, may have actually been not dangerous!

The 65.4 per cent (65.3 per cent before round-off errors) also serves to remind us that the above is merely an extensive extrapolation from extremely little data, that is, that 17 of 49 persons, or 34.7 per cent released against the advice of the Treatment Center recidivated; whereas 32, or 65.3 per cent did not. The above estimates, even if subject to sizeable errors, illustrate the over-prediction which . . . [it is suggested] . . . is inevitable in all such predictions."

Beyer, A CRITIQUE OF THE CONFINEMENT PROCESS UNDER THE MASSACHUSETTS SEXUALLY DANGEROUS PERSONS LAW (unpublished student paper, Harvard University, April, 1973) at 26-28 (footnotes omitted).

89. VIOLENT OFFENCES AGAINST PERSONS STUDY, PART II (1972) at pages 11-12.
90. For other examples to identify the relevant groups; see Toch, VIOLENT MEN (1969) ch. 5; Glaser, Kenefick & O'Leary, THE VIOLENT OFFENDER (1966) ch. 6; Boslow, Rosenthal & Gliedman, "The Maryland Defective Delinquency Law", (1959-60) 10 *Brit. J. Criminology* 5, at 6-10; Spencer, "A Typology of Violent Offenders" (California Dept. of Corrections, Research Report No. 23, 1966); Turner & Stokes, "The Dangerous Patient Offender", in PROCEEDINGS OF THE FOURTH RESEARCH CONFERENCE ON DELINQUENCY & CRIMINOLOGY (Montreal 1964) 253, at 257; Kozol, Cohen & Garofalo, "The Criminally Dangerous Sexual Offender", (1966) 275 *New Eng. J. Med.* 79. Kozol *et al*, cit. fn. 88 at 378-86 and 389-92. None of these categorizations would appear to be specific enough for the specialized purpose contemplated here. Another question, if only of theoretical interest, is whether any such typology should take into account in some manner a "typology of victims" or a "typology of crim-

inal-victim relationships." Schafer, *THE VICTIM AND HIS CRIMINAL: A Study in functional responsibility* (1968); Book Review (1970) 43 *S. Cal. L. Rev.* 128. There are two related problems that may help place the issue in perspective. One such situation is the case of homicidal threats: *CRIMINAL CODE S.331*. It is punishable, in the case of threats, "to cause death or injury to any person" by imprisonment for ten years. Here, the difficulty is that very few persons who make such threats actually commit homicide; but some do. MacDonald reports on a five to six year follow-up study of one hundred persons who were admitted to a psychiatric hospital specifically because they had made threats to kill. Three of the seventy-seven traced had, in fact, committed homicide. Four had committed suicide. MacDonald, *PSYCHIATRY AND THE CRIMINAL* (2d ed. 1968) 74-75. See generally MacDonald, *HOMICIDAL THREATS* (1968) The question then is how to predict which persons are likely to follow through on their threats. The other problem concerns the violent crime coming from the totally unexpected source. It seems that the truly terrifying crimes, the ones that inspire the public stereotype of the dangerous offender, are very frequently of this nature. See Toch, *VIOLENT MEN* (1969) 214-16. In these situations such warning signals as there may be are subtle, and almost certainly not of the kind that would justify definition in terms of dangerous offender provisions—although a given individual may, if "warning signals" are detected and the statutory conditions are met, be liable to committal under mental health legislation. See e.g., *The Mental Health Act*, R.S.O. 1970 c. 269, ss. 8 and 9. Presumably the celebrated Texas Tower killings by Charles Whitman (brain tumor) is a case in point. On the hazards of attempting to extend preventive detention legislation to such cases, see e.g., the issue of chromosomal abnormality as presented by the killing of eight Chicago nurses by Richard Speck in 1966, and "XXY mythology" as discussed by Fox, *XXY Chromosomes and Crime* (Lecture delivered by Fox at Centre of Criminology, Toronto, November 26, 1969). Megargee records the following examples:

In case after case the extremely assaultive offender proves to be a rather passive person with no previous history of aggression. In Phoenix an 11-year old boy who stabbed his brother 34 times with a steak knife was described by all who knew him as being extremely polite and soft spoken with no history of assaultive behaviour. In New York an 18-year old youth who confessed he had assaulted and strangled a 7-year old girl in a Queens church and later tried to burn her body in the furnace was described in the press as an unemotional person who planned to be a minister. A 21-year old man from Colorado who was accused of the rape and murder of two little girls had never been a discipline problem and, in fact, his stepfather reported, "When he was in school the other kids would run all over him and he'd never fight back. There is just no violence in him." Megargee, "Undercontrolled and Overcontrolled Personality Types in Extreme Antisocial Aggression", *PSYCHOLOGICAL MONOGRAPHS* (1966) 80, as quoted in Toch, *VIOLENT MEN* (1969) 214-15.

Megargee suggests that, while "moderately assaultive" offenders fit the classic pattern of high aggression levels with weak personality controls ("under-controlled"), the "extremely assaultive" offenders are, in fact, "over-controlled". They are introverted, rigid, and frequently have no criminal record before an explosive act erupts. For data supporting this view, see Blackburn, "Personality in Relation to Extreme Aggression in Psychiatric Offenders", (1968) 114 *Brit. J. Psychiatry* 821. But see Warder, "Two Stud-

ies of Violent Offenders" 9 *Brit. J. Criminology* 392-93.

91. See, e.g., Livermore, Malmquist & Meehl, "On the Justifications for Civil Commitment", (1968) 117 *U. Pa. L. Rev.* 75, at 76-77 n. 14, and references cited therein; Note, "Pennsylvania's New Sex Crime Law", (1952) 100 *U. Pa. L. Rev.* 727; Morris, "Psychiatry and the Dangerous Criminal", (1968) 41 *S. Cal. L. Rev.* 514, at 533-36. See also WILKINS, EVALUATION OF PENAL MEASURES (1969). Cf. Tao, "Some Problems Relating to Compulsory Hospitalization of the Mentally Ill", (1963) 44 *J. Urban Law* 459 at 474-82; Beck, "Reliability of Psychiatric Diagnoses: 2 A Study of Consistency of Clinical Judgments and Ratings", (1962) 119 *Am. J. Psychiatry* 351. But see discussion in DE REUCK & PORTER, THE MENTALLY ABNORMAL OFFENDER, (1968) 184-87. One writer reports:

Over this past year, with the help of two researchers, I conducted a thorough survey of all the published literature on the prediction of antisocial conduct. We read and summarized many hundreds of articles, monographs and books. Surprisingly enough, we were able to discover fewer than a dozen studies which followed up psychiatric predictions of antisocial conduct. And even more surprisingly, these few studies suggest that psychiatrists are rather inaccurate predictors—inaccurate in an absolute sense—and even less accurate when compared with other professionals, such as psychologists, social workers and correctional officials; and when compared to actuarial devices, such as prediction or experience tables. Even more significant for legal purposes, it seems that psychiatrists are particularly prone to one type of error—overprediction.

Dershowitz, "Psychiatry and the Legal Process: A Knife that Cuts Both Ways", (1969) 2 *Psychology Today* 43, at 47.

91. A e.g., Bartholomew, *op cit.* note 62, esp. at 351.
92. Marcus, "A Multi-Disciplinary Two Part Study of Those Individuals Designated Dangerous Offenders Held in Federal Custody in British Columbia, Canada" (1966) 8 *Can. J. Corr.* 90, at 100. The form of wording of this statement of "prognosis" is itself of interest, having regard to the problem of securing release. See *infra*.
93. cf. Kozol, *et al.*, cit. n. 88 and the criticisms made therein. We are thus left with the major policy issue posed by Morris: "What degree of risk should the community bear in relation to the countervailing values of individual freedom. That is, how many "false positive" predictions (he is predicted to be dangerous but does not prove to be) are justified for the social benefits derived from the "true positive" predictions?" Morris, "Psychiatry and the Dangerous Criminal", (1968) 41 *S. Cal. L. Rev.* 514, at 532-33. See *infra*.
94. Letter from J. Mohr to Ronald R. Price (March 10, 1970).
95. Stürup, TREATING THE UNTREATABLE (1968) 10-11. See also Von Hirsch, "Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons," (1972) 21 *Buffalo L. R.* 717, at 735-736.
96. Brancale, "Diagnostic Techniques in Aid of Sentencing" (1968) 23 *Law & Contemp. Prob.* 442, at 459. Similar disclaimers by psychiatrists of the reliability to predict the likelihood of future criminality are common. See, e.g. Halleck, PSYCHIATRY AND THE DILEMMAS OF CRIME (1967) 313-14; White, Krumholz & Fink, "The Adjustment of Criminally Insane Patients to a Civil Mental Hospital" (1969) 53 *Mental Hygiene* 34, at 39, based on experience with "Operation Baxstrom" (see notes 97-99 and accompanying text); Diamond & Louisell, "The Psychiatrist as an Expert Witness: Some Ruminations and Speculations", (1965) 65 *Mich. L. Rev.* 1335, at 1343; ONTARIO ASS'N OF CORRECTIONS AND CRIMINOLOGY

WORKING GROUP; Note, "Contemporary Studies Project: Detection, Treatment and Control of the Potentially Violent Person" (1969) 55 *Iowa L. Rev.* 118, at 141 (report of interviews with psychiatrists). Cf. MACDONALD. *PSYCHIATRY AND THE CRIMINAL* (2d ed. 1968) 74, at 76-77 and 91-92.

97. *Baxstrom v. Herold*, 383 U.S. 107 (1966).
98. See Morris, "The Confusion of Confinement Syndrome: An Analysis of the Confinement of Mentally Ill Criminals and Ex-Criminals by the Department of Correction of New York State:", (1968) 17 *Buffalo L. Rev.* 651. See also White, Krumholz & Fink, "The Adjustment of Criminally Insane Patients to a Civil Mental Hospital", (1969) 53 *Mental Hygiene* 34, at 39. For a similar experience with recidivism rates following the early release through court order of over one thousand inmates from the Florida prison system, see Eichman, "Impact of the Gideon Decision Upon Crime and Sentencing in Florida: A Study of Recidivism and Socio-Cultural Change" (Florida Division of Corrections 1966), as summarized in *SENTENCING ALTERNATIVES AND PROCEDURES* 58-59. See also Radzinowicz, "The Dangerous Offender", (1968) 41 *Police J.* 411, at 445.
99. See e.g., Carr-Hill "Victim Of Our Typologies" in *THE VIOLENT OFFENDER—REALITY OR ILLUSION* (1970 Oxford University Penal Research Unit) at 29-33; Morris, "The Confusion of Confinement Syndrome: An Analysis of the Confinement of Mentally Ill Criminals and Ex-Criminals by the Department of Correction of New York State", (1968) 17 *Buffalo L. Rev.* 651; Wolfgang, "Corrections and the Violent Offender", (1969) 381 *Annals Am. Acad. of Pol. & Soc. Sci.* 119, at 121. See also Sarbin, "The Dangerous Individual: An Outcome of Social Identification Transformations" (1967) 7 *Brit. J. Criminology* 285.
100. See notes 160 *et. seq.* and accompanying text.
101. *Supra* note 92, at 100.
102. Morris, "Psychiatry and the Dangerous Criminal" (1968) 41 *S. Cal. L. Rev.* 514, at 535.
103. Glaser, Kenefick & O'Leary, *THE VIOLENT OFFENDER* (1966) 35.
104. *Id.* at 36. For a more detailed analysis of a similar kind of problem, see Rosen, "Detection of Suicidal Patients: An Example of Some Limitations in the Prediction of Infrequent Events", (1954) 18 *J. Consulting Psychology* 397. See also Livermore, Malmquist & Meehl, "On the Justifications for Civil Commitment," (1968) 117 *U. Pa. L. Rev.* 75, at 84-86, and the excellent discussion in Von Hirsch, "Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons" (1972) 21 *Buffalo L. R.* 717. And see also the study in the District of Columbia of prediction of future criminality as a basis for bail release decisions, reported in Portman, "'To Detain or Not to Detain'—A Review of the Background, Current Proposals and Debate on Preventive Detention", (1970) 10 *Santa Clara Lawyer* 224 at 249-53.
105. Wenk *et al.*, "Can Violence Be Predicted" (1972) *Cr. and Delinq.* 393.
106. Silving, *ESSAYS IN CRIMINAL SCIENCE* (G. Mueller ed. 1967) 147.
107. *Id.* at 147 n. 57. See, e.g., the information listed in Glaser Kenefick & O'Leary, *THE VIOLENT OFFENDER* (1966) ch. 6.
108. See e.g., *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir. 1968). Cf., Rafalki, "Sociological Evidence As a Criminal Defence", (1967) 10 *Crim. L. Q.* 77; Zeisel, "Dr. Spock and the Case of the Vanishing Women Jurors", (1969) 37 *U. Chi. L. Rev.* 197. It might be noted that a fairly liberal interpretation of admissibility of evidence has been adopted in dangerous sexual offender cases in Canada because the proceedings have been regarded as in the nature of a

sentence determination, rather than analogous to the trial of an offence. See *Wilband v. The Queen* [1967] 2 C.C.C. 6. Contrast the American position as elaborated in *Speck v. Patterson* 386, U.S. 605 (1967). The issue is one of principle, and should be clarified in any proposals that are adopted.

109. In a "Chapter on The Inevitability of Error", Wilkins observes: "It is interesting that there has been so little discussion of this problem in the criminological literature. There is much discussion of decisions in the form of court orders, case work and the like, but the emphasis is on getting the decisions correct rather than accommodating uncertainty and probability of incorrect decisions. . . . If it is accepted that wrong decisions will be made from time to time, then it is reasonable to go on to consider what types of errors will be made, with what probability, and with what impact . . . The error system is as it were, a subsystem of the total decision-making system and an integral part of it." Wilkins, *EVALUATION OF PENAL MEASURES* (1969), 126-28.
110. See, e.g., Mohr, Turner & Jerry, *PEDOPHILIA AND EXHIBITIONISM* (1964) 83 and 156; Walker, Hammond & Steer, "Repeated Violence" [1967] *Crim. L. Rev.* 465; Walker *et al.*, "Careers of Violence" in *THE VIOLENT OFFENDER—REALITY OR ILLUSION* (Oxford University Penal Research Unit) at pages 5-6, and 9.
111. *Supra* note 33, See also footnote 113.
112. See *Blocker v. United States*, 288 F.2d 853, at 861 (D.C. Cir., 1961) (Burger C. J.). See also footnote 113.
113. Public General Laws of Maryland, S.5, art. 31B. It is interesting in this connection to note that the Maryland Defective Delinquent Act was conceived as a civil rather than a criminal statute because, as its Director explained: "[there is] . . . the question of whether it can be attacked for vagueness as being a criminal statute which does not sufficiently inform the accused of the nature of the offence for which he is to be punished. The principal answer to such attack would seem to be in the fact that the statute is not criminal in character. Its purpose is not to punish for the crime committed, but to remove the punishment from an offender who has been determined to be not fully responsible for his actions and to treat him until he can be restored to a state where it is safe for him to be restored to society." Boslow, "Mental Health in Action; Treating Adult Offenders of Patuxent Institution", (1966) 12 *Crime & Delinq.* 22, at 24. In a vigorous attack on the "vagueness" of the Maryland statute, the author of a recent article reports: "In 1964 the staff found 84 per cent of the convicts whom they evaluated to be defective delinquents. Since 1964 this figure has dropped to the 45 per cent level, although neither the definition of "defective delinquent" nor the type of convicts referred to Patuxent has changed . . . Dramatic shifts in interpreting a statute that allows indefinite confinement of individuals should be made by the courts or by specific legislative amendment—not by unarticulated, clinical diagnosis by administrative officials." Schreiber, "Indeterminate Therapeutic Incarceration of Dangerous Criminals: Perspectives and Problems", (1970) 56 *Va. L. Rev.* 602, at 616.
114. MASS. GENERAL LAWS, Ch. 123A, s. 1. "The inartful draftmanship of this formulation has been much criticized". Beyers, "A Critique of the Commitment Process under the Massachusetts Sexually Dangerous Persons Law" (1972, as yet unpublished) at page 5.
115. The Model Sentencing Act formulation is rejected by the American Bar Association Project because of its "lack of precision". *SENTENCING ALTERNATIVES AND PROCEDURES* 98. See also Kozol *et al.*, *supra* note 88, at 373 for a criticism of this formulation.

116. SENTENCING ALTERNATIVES AND PROCEDURES 96 and 98-99.
117. OUIMET REPORT at 258.
118. See Schreiber, *supra* note 113, at 616.
119. Bracketed subsections (3) through (5) have been added to section 3202 of the Study Draft to define "persistent felony offender", "professional criminal", and "dangerous, mentally abnormal offender". The issue posed is whether statutory definition is excessively rigid and development of the definitions is more appropriately left to the appellate courts [Footnote in the original]. The following are the subsections (3) to (5) referred to:
 - (3) Persistent Felony Offender
 - (a) Criterion. A persistent felony offender is a person, over 21 years of age, who stands convicted of a felony for the third time, as provided in this subsection.
 - (b) Computation of Prior Felonies. Two or more convictions for felonies that were committed prior to the time the defendant was convicted and sentenced for any of such felonies shall be deemed to be only one conviction. Convictions which have been set aside in post-conviction proceedings or which have been pardoned shall not be included.
 - (c) Time Limitation. At least one of the prior felony convictions shall have been for an offence committed within the five years next preceding the commission of the offence for which the offender is being sentenced, or, during such period, the offender was released, on parole or otherwise, from a prison sentence or other confinement imposed as a result of a prior felony conviction.
 - (4) Professional Criminal. A professional criminal is a person, over 21 years of age, who stands convicted of a felony which was committed as part of a continuing illegal business in which he acted in concert with a large number of other persons and occupied a position of organizer, a supervisory position or other position of management, or was an executor of violence. An offender shall not be found to be a professional criminal unless the circumstances of the offence for which he stands convicted show that he has knowingly devoted himself to criminal activity as a major source of his livelihood or unless it appears that he has substantial income or resources which do not appear to be from a source other than criminal activity.
 - (5) Dangerous, Mentally Abnormal Offender. A dangerous mentally abnormal offender is a person, over 21 years of age, as to whom it is concluded that his mental condition is gravely abnormal, that his criminal conduct was characterized by a pattern of repetitive or compulsive behaviour or by persistent aggressive behaviour with heedless indifference to the consequences, and that such condition makes him a serious danger to the safety of others. An offender shall not be found to be a dangerous, mentally abnormal offender unless the court has obtained a report from the Bureau of Prisons under section 3005 which includes the results of a comprehensive psychiatric examination.
120. WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS (1970) Vol. II at 1317-18. *Cf.* Schreiber, *op. cit.* note 113 at 614 *et seq.* for an illustration of judicial inability to pour meaning into Maryland's Defective Delinquent Law.
121. Schreiber, "Indeterminate Therapeutic Incarceration of Dangerous Criminals: Perspective and Problems". (1970) 56 *Va. L. Rev.* 602, at 613.
122. OUIMET REPORT at 263.
123. *Id.* at 263, quoting Guttmacher, *supra* note 29 at 390 (footnote omitted).
124. *Id.* at 264.

125. See REPORT OF THE ROYAL COMM'N TO INVESTIGATE THE PENAL SYSTEM OF CANADA (1938) ch. 19; Mewett, "Habitual Criminal Legislation Under the Criminal Code", (1961) 39 *Can. B. Rev.* 43; see also footnote 129.
126. H. C. DEB. 5196-97 (1948). See also McRUER REPORT 91-96. Compare the unproclaimed Part II of the *Narcotic Control Act*, R.S.C. 1970, ch. N-1, which provides for preventive detention for narcotic offenders and indeterminate custody for treatment of addicts. It appears to have gone unproclaimed since enactment in 1961 because no treatment facilities have been set up.
127. The Security Treatment Center Act, CONN. GEN. STATS. S. 17-253 (1958).
128. Smith, "Psychiatry in Corrections", (1964) 120 *Am. J. Psychiatry* 1045.
129. See H. C. Deb. 4650 (1970). Later figures cited in H. C. Deb. 1061 (1974, April) put the number at 14 full-time psychiatrists and about 45 psychologists, serving over 9,000 inmates. On the adequacy of penitentiary psychiatric facilities, see *Hospital Orders* at 1; GENERAL PROGRAM FOR DEVELOPMENT OF PSYCHIATRIC SERVICE IN FEDERAL CORRECTIONAL SERVICES IN CANADA (DEPT. OF SOLICITOR GENERAL, 1973); Desroches "Regional Psychiatric Centres: A Myopic View" (1973) 15 *Can. J. of Crim. & Corr.* 200.
130. Morris, "Psychiatry and the Dangerous Criminal", 41 *S. Cal. L. Rev.* 514 and 537.
131. See Lindman & McIntyre, THE MENTALLY DISABLED AND THE LAW (1961) at 306-08, and references cited therein; Hacker & Frym, "Sexual Psychopath Act in Practice: A Critical Discussion" (1955) 43 *Calif. L. Rev.* 766; Tenney, "Sex, Sanity and Stupidity in Massachusetts", (1962) 42 *Boston U. L. Rev.* 1; Note, "Pennsylvania's New Sex Crime Law" (1952) 100 *U. Pa. L. Rev.* 727; REPORT OF THE NEW JERSEY STATE COMMISSION ON THE HABITUAL SEX OFFENDER (1950).
132. On the importance of programme autonomy, see Studt, Messenger & Wilson, C-UNIT: SEARCH FOR COMMUNITY IN PRISON (1968) 280-81. This is recognized by the Paper on *Hospital Orders: Id.* at 36.
133. See Lindman & McIntyre, THE MENTALLY DISABLED OFFENDER AND THE LAW (1961) 507 and references cited therein; Rollin, THE MENTALLY ABNORMAL OFFENDER AND THE LAW (1969); Note, "Pennsylvania's New Sex Crime Law", 100 *U. Pa. L. Rev.* 727. Cf. Kozol, Cohen & Garofalo, "The Criminally Dangerous Sexual Offender", (1966) 275 *New Eng. J. Med.* 79, at 81-83; Kozol *et al.*, *op. cit.* note 90. Beyer, *op. cit.* f.n. 114 raises doubts about some of the success claims made in the last two references. See note 187 and accompanying text. Two of the leading Canadian proponents of this type of legislation recognize this when they state: "If only thirty per cent were recovered, it would be a victory for therapy and a relief to society." Turner & Stokes, "The Dangerous Patient Offender", in PROCEEDINGS OF THE FOURTH RESEARCH CONFERENCE ON DELINQUENCY AND CRIMINOLOGY (1964) 253, at 257. See Desroches, *op. cit.* note 129, at 208 *et seq.* for Canadian data and discussion. Cf. Outerbridge, "The Tyranny of Treatment . . ." (1968) 10 *Can. J. Corr.* 378. See also Heald and Williams, "The Hormonal Treatment of Sexual Offenders" (1970) 10 *Med. Sci. & Law* 27; Heald and Williams "A Note on the Scientific Assessment and Treatment of the Sexual Offender" (1971) 11 *Med. Sci. & Law* 180.

At Herstedvester, The Institution is headed by a female doctor assisted by three senior psychiatrists. There is also one chief resident, one resident, three

- psychologists, seven social workers, four psychiatric nurses, three school teachers and some part-time teachers. Most of this staff hold down teaching posts elsewhere. There are also 130 "guards", and the Institution operates on a system of milieu therapy. The main job of the trained staff is to educate the guards to assist the population of 150 patients. Drug treatments are used less than in the ordinary state hospitals. Conversation cited note 72.
134. Frankel, "Preventive Restraints and Just Compensation: Toward a Sanction Law of the Future", (1968) 78 *Yale L.J.* 229, at 241. It has been suggested that in the United States, on these very grounds, criminal sexual psychopath legislation should be considered "cruel and unusual punishment" within the meaning of the Eighth Amendment to the United States Constitution: See Burick, "An Analysis of the Illinois Sexually Dangerous Persons Act", (1968) 50 *J. Crim. L. Crim. & P.S.* 254, at 258-59.
 135. See Hall, "The Purposes of a System for the Administration of Criminal Justice", (Edward Douglas White Lecture, Georgetown University 1963). Frankel offers the interesting proposal that "[W]henver the state finds it necessary to take an innocent man's liberty for a public purpose, due process should require the state to pay adequate compensation for the taking . . ." He argues: "Paradoxically perhaps, the fixing of a cash price which must be paid for a man's liberty would not cheapen his liberty but instead give it greater meaning. Payment of compensation would serve significant social purposes as well." Frankel, "Preventive Restraints and Just Compensation: Toward a Sanction Law of the Future" (1968) 78 *Yale L. J.* 229, at 257. The "practical purposes" he develops at some length, and suggests an interesting, albeit radical, approach to this problem. See also, *infra*, notes 136 and 138; Allen, *THE BORDERLAND OF CRIMINAL JUSTICE* (1965); Morris, "Impediments to Penal Reform", (1966) 33 *U. Chi. L. Rev.* 627, at 637-44; Outerbridge, "The Tyranny of Treatment . . ." (1968) 10 *Can. J. Corr.* 378.
 136. See *Rouse v. Cameron*, 373 F2d 451 (D.C. Cir. 1966); Symposium, "The Right to Treatment" (1969) 57 *Geo. L.R.* 673-90, especially Halpern, "A Practicing Lawyer Views the Right to Treatment", at 782; Symposium "The Right to Treatment" (1969) 36 *U. Chi. L. Rev.* 742-801, especially Bazelon, "Implementing the Right to Treatment", at 742; Note, "Civil Restraint, Mental Illness, and the Right to Treatment" (1967) 77 *Yale L.J.* 87; see also note 138.
 137. *Hospital Orders* (October 1973), at 9, 11 and 22. See Schwitzgebel, "Limitations on the Coercive Treatment of Offenders" (1972) 4 *Crim. L. Bull.* 267.
 138. Cf., *Ibid* at 9-10. See also *Sentencing and Dispositions* paper at 30; Desroches, *op. cit.* note 149 at 212 *et seq.* The problem is one facet of the larger problem of "judicializing" the substantive content of sentences, and not merely the quantum:

A "sentence" . . . like any encroachment upon one's liberty, has two dimensions: quality and quantity. Three years' unconditional discharge resembles in no way three years in a maximum security penitentiary . . . [W]e must accept that laws enter into play as soon as the sentence has been given and import into the process a large proportion of indeterminate components. The "sentence" in fact is judicial only in that portion of it which is determinate . . . ; it is administrative in all of that portion of it which is indeterminate . . . and if one looks more closely at the laws one sees that the administrator really "sentences" the prisoner much more than does the Court . . .

. . . .

Certain countries have within their judicial branch two categories of

judges: those who preside over trials and pass sentences just as any of our Canadian judges, and those who take charge of the prisoner once he has been sentenced and preside over the serving of his sentence. Members of the judicial branch, . . . who are part of this second category of judges, are specially trained to assume these responsibilities. After a multi-disciplinary consultation they determine for each sentenced person the principal modalities and conditions under which that sentence will be served. They are prison inspectors and they hear those petitions which by law prisoners can make. They preside over the activities of probation officers and may, under certain circumstances, modify the conditions of a release or even revoke it. They preside over parole. In fact, they control in the name of the judicial branch all modifications of the judicial sentence. They are judges, but specialized judges. They are members of the judicial branch and, as such, the "acts of justice" they perform are judicial acts. They are answerable to the Judicial Council and are totally independent of the Minister of Justice, the Attorney-General or the Solicitor General. Between our present structures and the one I have now summarily proposed there is a rigmarole of possible modifications which would contribute more or less towards a judicial control of the judicial sentence. I am inviting you to consider them . . .

(A. Lamer, Vice-Chairman, Law Reform Commission of Canada.)

In Denmark an institutional "ombudsman" operates at Herstedvester as the control mechanism. A lawyer is appointed to the staff as vice-governor, with the defined goal of protecting individuals from psychiatric treatment programs. ECT is not used at Herstedvester, but mechanical restraint is and the lawyer "keeps a close eye" on its use. By regulation after 24 hours use this fact must be reported by telephone and in writing. Conversation cited note 72.

139. ONTARIO ASS'N OF CORRECTIONS AND CRIMINOLOGY WORKING GROUP 5. For the Ouimet Committee definition referred to, see text at footnote 117.
140. The McRuer Commission referred to the unreported Ontario Supreme Court decision in *Regina v. Leshley*, and to the reasons for judgment of Mr. Justice Rand in *The Queen v. Neil* [1957] S.C.R. 658, as holding that the proof beyond a reasonable doubt standard applies. None of the other members of the Court discussed the standard of proof in *Neil*. This was clearly the standard the Court addressed to itself in *Regina v. Binette*, [1965] 3 C.C.C. 216 (B.C.) In a number of cases, the court speaks of there being "no doubt in my mind" and so on. See, e.g., *Regina v. McAmmond* (1969) 7 C.C.C. 210, at 220. It is clear that, under the habitual criminal provisions the proof beyond a reasonable doubt requirement applies to every element specified in s. 688 of the Code: *Poole v. The Queen* (1968) 3 C.C.C. 214; *Bingham v. The Queen* (1970) 13 C.R.N.S. 133 (S.C.C.) The McRuer Commission "argued with great force that to require proof beyond a reasonable doubt in the trial of the issue tends to render the law ineffective." ROYAL COMMISSION REPORT 38 and 124. It took the position that "the considerations that arise in deciding whether in the circumstances an indeterminate sentence is the proper one to be imposed are not the same considerations that arise in proof of the guilt of crime" and that, provided adequate review procedures are available, "a standard of proof no higher than preponderance of probability would afford greater protection to society and impose no injustice on the prisoner." *Id.* at 38. The "considerations that arise" doubtless refers to the Commission's strongly held view that the

then criminal sexual psychopath hearing was in the nature of a pre-sentence hearing, not a criminal trial in the ordinary sense." *Id.* at 31-32, in rejecting a proposal for jury trial on the application to have a prisoner declared to be a criminal sexual psychopath. This view, notwithstanding its support by judicial interpretation is in the writer's opinion unfortunate. Thus, in rejecting the rule against admissibility of involuntarily obtained confessions in a dangerous sexual offender proceeding, the Supreme Court of Canada stated: "One of the reasons flows from the very nature of the issue involved in these proceedings. The issue . . . which can only be resorted to if the accused has been convicted of a sexual offence, is not whether he should be convicted of another offence, but solely whether he is afflicted by a state or condition that makes him a dangerous sexual offender . . ." *Wilband v. The Queen* [1967] 2 C.C.C. 6, at 9 (S.C.C.) (Fauteux J.). *But see Poole v. The Queen* [1968] 3 C.C.C. 213, in which the Supreme Court of Canada allowed an appeal against a "sentence of preventive detention" in an habitual criminal proceeding notwithstanding the fact that the Supreme Court has no jurisdiction to hear appeals against sentence. However, in dealing with the procedural requirements under the Colorado Sex Offenders Act, the United States Supreme Court in *Specht v. Patterson* quoted with approval the following statements from a Court of Appeals decision on a comparable Pennsylvania statute: "It is a separate criminal proceeding which may be invoked after conviction of one of the specified crimes . . . At such a hearing the requirements of due process cannot be satisfied by partial or niggardly procedural protections. A defendant is entitled in such a proceeding to the full panoply of the relevant protections which due process guarantees in . . . criminal proceedings." *Specht v. Patterson*, 386 U.S. 605, at 609 (1967) quoting *United States ex rel. Gerchman v. Maroney*, 355, F.2d 302, at 312 (1965). This is surely the preferable view, and requires an appropriately higher standard of proof.

141. Recent developments in the American case law are reviewed in Beyer, *op cit* n. 114 at pages 51-59. For a discussion of the "clear and convincing evidence" standard see 32A C.J.S. S.1023 (1964). See also WIGMORE ON EVIDENCE (3d ed. 1940) S.2498. There has been some debate as to whether the civil and criminal standards of proof are, in fact, distinguishable. See, e.g., *Regina v. Summers* (1952) 36 Cr. Appr. 14; *Regina v. Hepworth* [1955] 2 Q.B. 600 (Ct. Crim. App.); Williams, THE PROOF OF GUILT (3d ed. 1963) 190-94. It is submitted that there is a basis for identifying separate evidentiary standards. See McBaine, "Burden of Proof: Degrees of Belief" (1944) 32 *Calif L. Rev.* 242.
142. Express provision to this effect is provided for under the Maryland Defective Delinquent Act. See *Director of Patuxent Institution v. Daniels*, 221 A.2d 397, at 413 (1966). It is doubtful whether a prisoner could require production of such material in Canada. *Cf. Regina v. Patterson* (1969) 8 C.C.C. 27 (Alta.).
143. Again, there is provision in law for this in Maryland. See *Director of Patuxent Institution v. Daniels*, 221 A.2d 397, at 413 (1966). For an imaginative discussion of the role that an independent psychiatrist might serve in the prisoner's behalf, see Frankel, "Preventive Restraints and Just Compensation: Toward Sanction Law of the Future", (1968) 78 *Yale L.J.* 229, at 259-62. For an indication of the importance of independent psychiatric testimony to defence counsel, see Arens, "The Durham Rule in Action: Judicial Psychiatry and Psychiatric Justice", (1967) 1 *Law & Soc. Rev.* 41, at 62-66; Arens, "The Defence of Walter X. Wilson: An Insanity Plea and a Skirmish in the War on Poverty", (1966) 11 *Villanova L. Rev.* 259.

144. See, e.g., Arens, *supra*, at 72-75; Comment, "Sexual Psychopathy: A Legal Labyrinth of Medicine, Morals and Mythology", (1957) 36 *Nebraska L. Rev.* 320 at 337; Tenney, *supra* note 4 at 304. The questions of "psychiatric reports" and "psychiatric examinations" are obviously related. In Canada, there is evidence from reported cases that psychiatric examinations on dangerous offender applications are sometimes quite perfunctory. See, e.g., *Regina v. Neil* (1957) 26 C.C.C. 281 (S.C.C.) where Locke J. records that one psychiatrist gave his opinion on the evidence heard at trial and the other on the basis of an examination of the accused of "some one and one-half hours while he was in custody . . ." *Id.* at 288. An examination of the trial transcript in the leading case of *Wilband v. The Queen* [1967] 2 C.C.C. 6 (S.C.C.) raises serious questions as to the adequacy of examinations conducted.
145. While required periods of remand for mental examinations should do much to solve the problem of superficial psychiatric reports, it may be desirable to specify standards by law. It is interesting that, while psychiatrists frequently disagree on their assessment of individual cases, it is apparently the practice, as reported to the author, not to record disagreement on the patient's medical record. Knowledge of such disagreement could be invaluable to defence counsel, and should be available. For a discussion of this problem, see Arens, *supra* note 143.
146. CALIFORNIA WELFARE & INSTITUTIONS CODE S.5504 (West 1955).
147. See Stürup, *TREATING THE UNTREATABLE* (1968) 3. Szasz has observed:

"I would consider a panel of impartial psychiatric experts much more attractive if its advocates had also foreseen the need for "higher courts" of panels. In other words, if they had anticipated stupidity or malfeasance on the part of experts, and had provided for the orderly review, and, if necessary, reversal of their findings . . . This lack of foresight—if that is what it is—is disturbing, for it reflects the consistent expectation that, while other people in society need watching to ensure their honesty and correct performance, doctors do not . . . [I]f psychiatric experts are to wield more power, they should also be supervised more carefully." Szasz, *LAW LIBERTY AND PSYCHIATRY* (1963) 116.
148. As recommended by the Ouimet Report. See also *Hospital Orders* at 23-4 for a discussion of some of the issues involved here.
149. It should be noted that section 689 of the code requires the court to "hear any relevant evidence" and "the evidence of at least two psychiatrists". It has been held that this does not require that the psychiatrists have actually examined the accused: See *Regina v. Kanester*, [1968] 1 C.C.C. 351 (B.C.). All that is required is that the psychiatrist have access to sufficient information upon which to form an opinion. Canadian law allows a psychiatrist wide latitude in regard to the information that he can utilize in forming a professional opinion. See *Wilband v. The Queen*, [1967] 2 C.C.C. 6 (S.C.C.) and more particularly the trial transcript. Indeed, the psychiatrist may form his opinions merely by hearing the evidence presented in court. See, e.g., *Regina v. Binette*, [1953] 3 C.C.C. 216 (B.C.). It would seem also that the conception of the proceeding as being in the nature of a hearing on sentence has tended to lessen the rigour of the ordinary trial requirements of proof. See *Wilband* and *Binette*. There are understandable difficulties where the accused refuses to co-operate in a psychiatric examination. See *Kanester*. At least one American jurisdiction has made failure to co-operate with the psy-

- chiatric examination contempt of court. *See* Comment, "Sexual Psychopathy: A Legal Labyrinth of Medicine, Morals and Mythology", (1967) 36 *Nebraska L. Rev.* 320, at 336 n. 66 (1967). However, considering official psychiatric pronouncements on the importance of detailed observation and examination of the subject for a proper assessment, one must surely question the reliability of such "diagnosis at a distance . . ." *See, e.g.* Overholser, "Criminal Responsibility: A Psychiatrist's Viewpoint", (1962) 48 *A.B.A.J.* 527, at 529; Weihofen, *THE MENTAL DISORDER AS A CRIMINAL DEFENSE* (1954) 334. When there is added to this the more than reasonable doubt about prognostic accuracy of psychiatric assessments under the best of circumstances, one may well ask whether the uses of psychiatry are not being outweighed by its abuses.
150. *See, e.g.*, MODEL SENTENCING ACT S. 6; 18 U.S.C. S. 4208(b); CALIFORNIA WELFARE & INSTITUTIONS CODE S. 5512 (West 1955).
 151. OUIMET REPORT at 259.
 152. *See Penitentiary Act* R.S.C. 1970, Ch. P-6, ss. 22(1) and 24(1) providing respectively, for "statutory remission amounting to one-quarter of the period for which he has been sentenced or committed as time off subject to good conduct" in the case of a fixed term sentence, and "three days" remission of his sentence in respect of each calendar month during which he has applied himself industriously to his work . . ."
 153. It has been held that an accused may not exclude statements made to a psychiatrist from evidence under the involuntary confession rule because a psychiatrist is not a "person in authority", and because the proceeding is not in the nature of a criminal trial, but rather a hearing on sentence. *Wilband v. The Queen* [1967] 2 C.C.C. 6. *See also Regina v. Johnston*, [1965] 3 C.C.C. 42 (Man.) The *Wilband* reasoning on both grounds has been strongly criticized. *See* Note, (1967) 10 *Crim. L. Q.* 12. *See also* the earlier decision in *Regina v. Leggo*, 133 C.C.C. 149 (B.C.) In contrast, see the developing American position as expressed in *United States v. Albright*, 388 F.2d 719 (1968); *In re Spencer*, 406 P.2d 33 (1965). *See also* Note, "Changing Standards for Compulsory Mental Examination", [1969] *Wisconsin L. Rev.* 220; Note, "Right to Counsel at the Pretrial Mental Examination" (1970) 118 *U. Pa. L. Rev.* 448. Where the accused has stood on his right not to "incriminate" himself he has, under the existing Code provisions, not advanced his position appreciably. *See e.g., Regina v. Kanester*, [1968] 1 C.C.C. 351 (B.C.); *Regina v. McAmmond* (1969) 7 C.C.C. 210 (Man.).
 154. The nature of the issues involved, however, is suggested in the report of the Kingston study group:

The Report recommends that an offender be notified that it is alleged that he is a dangerous offender only *after* he has been diagnosed as such. Certainly an offender will be fully aware of what is at stake when he enters the diagnostic centre. What if he then decides not to co-operate with the diagnostic personnel? The only potentially effective way of assessing potential dangerousness appears to be personality assessment by means of interviews and tests. It would appear to be virtually impossible to force a determined offender to submit to such devices against his will. According to the Report, only a positive diagnosis of dangerousness can lead to preventive detention. If it is impossible to make any diagnosis as to dangerousness it then follows that the court is *precluded* from ordering preventive detention.

If an offender can prevent diagnosis by merely refusing to co-operate, will the institution have to rely merely on the chance that the offender won't realize this? Will they be given the right to use certain drugs to

extract information from him? Will diagnoses have to be made on perhaps less reliable bases that are not dependent upon co-operation from the offender? What will be the legal position of lawyers or others who advise the offender that he might be able to prevent diagnosis by refusing to co-operate? These and other questions must surely be answered before the proposed legislation can be adopted.

[Moreover] . . . it is not made clear whether the offender is merely to be diagnosed while at the centre, or whether he may also be subjected to treatment—perhaps against his will. It would be argued that compulsory treatment may not be administered until there has been a judicial determination of dangerousness, although the Report makes no mention of this issue.

ONTARIO ASS'N OF CORRECTIONS AND CRIMINOLOGY WORKING GROUP, at 9-10. One danger is that, in the event of failure to co-operate, the process would revert to the standard that has obtained in dangerous sexual offender hearings. See note 149 and references cited therein. A more subtle, and perhaps greater danger is that this very failure to co-operate will be taken as an aspect of the prisoner's "problem" and thus become part of the clinical basis for a negative evaluation. As an indication that the working group and concerns are not fanciful, and that the problems are real, see *McNeil v. Director, Patuxent Institution*, (1972) 407 U.S. 245. See also, *In re Maddox*, 88 N.W. 2d 470 (1957); Hacker & Frym, *supra* note 4 at 774 n.14. On the use of drugs with the non-co-operative patient offender, see Morris, "Criminality and the Right to Treatment" (1969) 36 *U. Chi. L. Rev.* 784, at 799-800. See also Beyer *op. cit.* n. 114 at 55-63.

155. See note 132 and accompanying text. The problem would seem to be less acute at Herstedvester because the director of the institution has direct access to the court to "alter the earlier decision made concerning the nature of the measure". Stürup, *TREATING THE UNTREATABLE* 251. It would appear also that the director has a very substantial voice in the decision to release. *Id.* at 219.

On the question of the use of the proposed medical-psychiatric centres for diagnostic referrals, the following comments are relevant:

Use of the Regional Medical Centre for this purpose presents four fairly serious problems . . . Second, such men will have to be isolated from the offender population, thereby restricting to some degree the use of the facilities by the men for whom they were primarily designed. Third, the argument has been made that the establishment of a therapeutic relationship with an inmate is greatly hampered when the inmate has reason to believe that the doctor himself, or his colleagues, are responsible for his presence in the institution. Fourth, psychiatrists and other treatment personnel do not like to spend the bulk of their time on diagnostic tasks, especially when they are not diagnosing people they can view as their patients. The attractiveness of the Centre as a place to work will vary inversely with the amount of routine "service" work that must be done . . . [T]he impact . . . [of these problems] . . . is sufficient to warrant a strong recommendation that every effort be made to avoid use of the Centre as a routine diagnostic facility.

Picard, Project and Research Design for the Proposed Regional Medical Centre of the Canadian Penitentiary Service, Millhaven, Ontario 51-52 (LL.M. thesis, Queen's University, first draft, June 1970).

156. 18 U.S.C. § 4208(b). One danger is that this procedure may tend to lead to a number of unnecessarily long sentences unless it is confined to cases where a

"special term" only is under consideration. The following appears in correspondence received from a former United States Attorney:

The deferred sentencing provision of the U.S. Code is intriguing but my experience was that it was relatively useless in practice and merely served as reinforcement or rationalization for a judge's pre-determined disposition towards the imposition of a prolonged sentence. Used usually in serious felonies and often in bank robbery cases, the judges utilizing the services of the medical centre seldom received the information they sought nor were capable of acting upon that which they did receive. A number of reports filed under the Act provided the court with an in depth analysis of the prisoner's personal and sometimes personality problems—but there appeared no clear formula for the judge to use to translate this into a meaningful sentence. Told that a prisoner was anti-social, had paranoid ideation or what have you, this didn't assist the court in arriving at any relevant sentence. It might well be of assistance to prison personnel after sentence as a guide to treatment . . .

To the judge, it simply confirmed the need for a lengthy sentence.

Letter from Travis Lewin to Ronald R. Price, February 27, 1970.

157. See text at note 179. See also note 173, references cited therein and accompanying text.
158. OUIMET REPORT at 262-63.
159. This criticism has been made by the Kingston study committee, whose membership included experienced correctional officials. See ONTARIO ASS'N OF CORRECTIONS AND CRIMINOLOGY WORKING GROUP, AT 5. The recommendation may have had its source in the McRuer Commission. If this criticism has substance, it may be that this is another indication that the provision of "special terms" should properly be linked with a downward revision of statutory maxima as part of a general review of sentencing structure. See note 73 and accompanying text.
160. See e.g., Hacker & Frym, *supra* note 4; Morris, *supra* note 195; Scheff, BEING MENTALLY ILL: A SOCIOLOGICAL THEORY (1966) ch. 5.
161. See, e.g., Rock, Jacobson & Janopaul, HOSPITALIZATION AND DISCHARGE OF THE MENTALLY ILL (Am. B. Foundation Special Comm. on Procedures for Hospitalization and Discharge of the Mentally Ill, 1968) 215-18 and 261-63. There is some indication that a higher standard of social adjustment is often applied in considering eligibility for release than would have been employed in making a decision on initial committal. See, e.g., Kozol, *supra*, note 4 at 83. Cf. Hess, Pearsall, Slichter & Thomas "Competency to Stand Trial" (1961) 59 Mich. L. Rev. 1078. This now appears to have judicial sanction in Canada. See *Lingley v. New Brunswick Board of Review Under Section 547 of the Criminal Code of Canada* (F.C., 1973—as yet unreported).
162. See, e.g., Sturup, TREATING THE UNTREATABLE (1968) 11; Dawson, "The Decision to Grant or Deny Parole: A Study of Parole Criteria in Law and Practice", [1966] Wash. U.L.Q. 244, at 265-66 and 276-77. Wilkins recognizes this fact in making the following observations:

"In the case of violent offenders who appear before parole boards, it is known that the boards' decisions are determined by factors other than the likelihood of recidivism. Although all prediction tables that have taken account of the factor have consistently shown that the violent offender is a relatively good risk in terms of recidivism, yet parole boards will be more reluctant to release such persons than similar nonviolent offenders with higher risk factors. The decision to release on parole cannot, therefore, be a direct function of the risk of recidivism. It may

be that some simple conversion of the simple risk probability could suffice to explain the general nature of the decisions, such as for example, the multiplication of the risk estimate by some factor that relates to the type of crime for which the offender was first incarcerated . . . The parole board's (decision-maker-producer's) risk would require larger odds in its favour in the case of certain types of offences, because, should the offender in fact commit a further crime, the publicity attending the case would reflect adversely upon the board." Wilkins, *EVALUATION OF PENAL MEASURES* (1969) 121.

See generally Cohen, "The Function of the Attorney and the Commitment of the Mentally Ill", (1966) 44 *Texas L. Rev.* 424. For an excellent, and not intemperate discussion of the problem, see Szasz, "Hospital Refusal to Release Mental Patient" (1960) 9 *Clev.-Mar. L. Rev.* 220.

163. Beyond the scope of this particular paper is the question as to whether the regular courts constitute the most appropriate reviewing body for correctional decisions at all. Some continental countries have developed the institution of the "judge supervising execution of sentence". See, Silving, *supra* note 23 at 127-38. This institution was adopted in the German Draft Penal Law of 1962, in the *Vollstreckungsgerichte*, or "court of enforcement". See Ehrhardt, "The Concept of Corrective Treatment of Delinquents in the German Penal Law Draft of 1962" (Paper delivered at 5th International Criminological Congress Montreal 1965) at 20-21. It seems that the "court of correction" has, among its functions, a review of the necessity for continued preventive detention. See, *ibid* at 40-42. Ehrhardt also proposes that the "court of correction" be made collegiate, adding to its members from psychiatry and social work. Collegiate courts of sentencing are the rule in continental countries. See George, *supra* note 23 at 251-52. It may be suggested that the "court of correctional supervision" concept merits serious exploration in relation to a variety of kinds of judicial decisions that may be required in the correctional process. Cf. Silving, "A Plea for a New Philosophy of Criminal Justice" (1966) 35 *REVISTA JURIDICA DE LA UNIVERSIDAD DE PUERTO RICO* 406; Kimball & Newman, "Judicial Intervention in Correctional Decisions: Threat and Response" (1962) 14 *Crime & Delinquency* 1.
- 163a. N. Morris and G. Hawkins, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL*, 1970, pp. 89 and 91.
164. Letter from J. Mohr to Ronald R. Price (March 10, 1970).
165. Carr-Hill, *op cit* note 99, at 29-33.
166. OUIMET REPORT at 263.
167. *Director of Patuxent Institution v. Daniels*, 221 A.2d 397 at 424 (1966).
168. Reich, "Therapeutic Implications of the Indeterminate Sentence", (1966) 2 *Issues in Criminology* 7, at 8.
169. MODEL SENTENCING ACT, s.18.
170. *Supra* note 168 at 25-26. See also the following commentary on the experience with committals on indeterminate sentence under the California Sexual Psychopath Act:

"The treatment purpose which the legislation may have intended . . . is clearly less obvious to the offender than the punitive flavor of involuntary confinement under maximum security conditions. Therefore, quite naturally the treatment goal recedes in the minds of the offenders who feel themselves to be prisoners before they can realize their role as patients. Hence, one meets a great number of offenders whose statements are, consciously or unconsciously, designed to meet the expectations of the authorities, who appear to them as jailers before they

can be appreciated as doctors. This accounts for the extraordinary incidence of oral or written outpourings by offenders, fairly dripping with self-accusations calculated to demonstrate what the offender believes the psychiatrist will call "insight" . . . The present set-up compels, for quite realistic reasons of early discharge, the stereotype confession orgies of the more intelligent offenders—which are, of course, travesties of "insight" rather than expressions of it."

Hacker & Frym, "Sexual Psychopath Act in Practice: A Critical Discussion" (1955) 43 *Calif. L. Rev.* 766, at 744. The authors conclude:

"[I]n a treatment setting where patients feel that only a certain type of response will be tolerated because any other leads to prolonged treatment—which also means prolonged incarceration for a period of several more years—no real remedy or cure for subtle, unconscious, repressed mechanisms can be expected, even under the most favourable conditions and the enthusiastic assistance of the professional personnel."

Id. at 774, n. 14. See also, Fox, THE ENGLISH PRISON AND BORSTAL SYSTEM (1952), at 306.

171. See Bartholomew, *op cit* note 62 at 336; Rubin, CRIME AND JUVENILE DELINQUENCY (3d ed. 1970); Tappan, CRIME, JUSTICE AND CORRECTION (1960) 433-37; Morris & Howard, STUDIES IN CRIMINAL LAW (1964); Cantor, CRIME AND SOCIETY (1939) 267-73; Radzinowicz, THE MODERN APPROACH TO CRIMINAL LAW (1968) 167-69; Fox, THE ENGLISH PRISON AND BORSTAL SYSTEMS (1952) 305-07; Goldstein, "The Mentally Disordered Offender and the Criminal Law", in THE MENTALLY DISORDERED OFFENDER (de Reuck & Porter eds. 1968) 88; Dession, "Psychiatry and the Conditioning of Criminal Justice", (1968) 47, *Yale L.J.* 319, at 328-35. See Note, "Indeterminate Sentence Laws—The Adolescence of Peno-Correctional Legislation", (1937) 50 *Harv. L. Rev.* 677; Williams, "Alternatives to Definite Sentences", (1964) 80 *L.Q.R.* See generally U.N. DEPT. OF SOC. AFF., THE INDETERMINATE SENTENCE (1954).
172. Stürup, TREATING THE UNTREATABLE (1968) 8. Elsewhere Stürup has reported: "We now keep aggressive criminals a comparatively short time. Nine per cent are paroled in under 2 years, 34 per cent between 2 and 4 years, and 57 per cent after more than four years. Only 7 per cent are more than 5 years and it is a rare man that is kept more than 10 years. For many years not one of our paroled serious offenders—rapists, murderers, robbers and arsonists—have repeated such crime after parole." Sturup, "Will This Man be Dangerous?", in THE MENTALLY ABNORMAL OFFENDER (de Reuck & Porter eds. 1968) 5, at 16.

As of July 1, 1973 important changes have been made in Danish law which lend considerable force to the points made in the text. The indeterminate sentence has been eliminated for all offences except arson, rape and murder. Psychiatrists apparently were against these exceptions, but the result was a political compromise. For those offences constituting exceptions custodial considerations only govern the length of stay. Conversation cited note 72.

173. That such early release is unlikely may perhaps be inferred from the figures relating to parole for habitual criminals and dangerous sexual offenders. See *supra* notes 8 and 46. Nor, without a basic revision of statutory maxima as a whole, is such early release for dangerous offenders probable. One author has noted: "Preventive detention can legitimately be imposed only in

- cases where, at a minimum, the person to be restrained lacks ordinary capacity to conform his conduct to the requirements of the law. One who cannot be expected to conform to the law cannot be blamed for nonconformity, but his inability is sufficiently threatening to the safety and welfare of others." Frankel, "Preventive Restraints and Just Compensation: Toward a Sanction Law of the Future" (1968) 78 *Yale L.J.* 229 at 249. If this argument is accepted then the dangerous offender concept should in some way be related to a principle of "diminished responsibility". It would appear than this is how such committals are regarded in Denmark. See the legislative provisions set out in Sturup, *THE MENTALLY ABNORMAL OFFENDER* (1960) at 249-51. *Cf.*, Goldstein & Katz, "Dangerousness and Mental Illness; Some Observations on the Decision to Release Persons Acquitted by Reason of Insanity", (1960) 70 *Yale L.J.* 225 at 238-39. *See generally* Wootton, *CRIME AND THE CRIMINAL LAW* (1963) 58.
174. *See*, Conrad, *CRIME AND ITS CORRECTION* (1965) 220. *See also* Van Rooy, "Findings of an Investigation Into Habitual Offenders" (1963) 3 *Excerpta Criminologica* 11. *But see* Radzinowicz & Turner, *THE PERSISTENT OFFENDER* (1945) 164-66.
 175. *See Director of Patuxent Institution v. Daniels*, 221 A.2d 397, at 424-25 (Appendix) (1966); Schreiber, "Indeterminate Incarceration of Dangerous Criminals; Perspectives and Problems", (1970) 56 *Va.L. Rev.* 602, at 627-28. *But see* Boslow & Kandel, "Psychiatric Aspects of Dangerous Behaviour: The Retarded Offender" (Address delivered at Annual Meeting of American Psychiatric Association, May 4, 1965.) For a more recent judicial consideration of Patuxent, *see Tippet v. Maryland*, (1971) 436 F.2d 1153.
 176. Guttmacher, *THE ROLE OF PSYCHIATRY IN LAW* (1968) 129.
 177. Desroches, "Regional Psychiatric Centres: A Myopic View" (1973) 15 *Can. J. of Crim. & Corr.* 200 and 214.
 178. This statement raises the major and basic issue that at a certain level no sub-system of the criminal process can be divorced from its context. In Denmark, inmates sent to Herstedvester are often returned to their original institutions when the Herstedvester staff feels they can no longer be assisted at that institution. This is viewed as proper because conditions in Danish prisons are on a high level with proper staff and the return does not nullify any previous assistance given the inmate. "Institutions must be considered against the general social background", the latter being more important than any institution. The general Danish social background permits the existence of more decent prisons which in turn permits the existence and ostensible successful functioning of an institution like Herstedvester. Conversation cited note 72.
 179. OUIMET REPORT at 262.
 180. MODEL SENTENCING ACT ss. 5 and 6, at 18 (with commentary). *See also* WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAW (1970 Vol II, at 1296.
 181. *See*, Glueck & Glueck, *JUVENILE DELINQUENTS GROWN UP* (1940) and *AFTERCONDUCT OF DISCHARGED OFFENDERS* (1945); Cormier *et al*, "Presentation of a Basic Classification for Clinical Work and Research in Criminality", (1959) 1 *Can. J. Corr.* 21 and "The Natural History of Criminality and Some Tentative Hypothesis on its Abatement," (1959) 1 *Can. J. Corr.* 35; Cormier, "Depression and Persistent Criminality", (1966) 11 *Can. Psychiatric Ass'n J.* 208 (Special Supplement). Claims for "abatement" are seriously questioned in a review of the published research in MANNHEIM, 2 *Comparative Criminology* (1965) 682-89. The important

question, however, relates to those offenders who may be considered dangerous, and the prospects of "abatement" over any given period of time from the probable age of sentence. One major study concluded: "In reviewing the literature from various disciplines on the topic of homicide, we are struck by the fact that very violent crimes are rarely committed . . . by persons over forty years of age. When these cases occur, causal agents most frequently concentrate around individual pathologies such as brain damage and abnormal E.E.G. patterns, or clear-cut and marked psychic disturbance, often without the usual accompanying social pathologies . . ." Wolfgang & Ferracuti, *THE SUBCULTURE OF VIOLENCE* (1967) 260. On the other hand, a study of 141 persons committed over a 5 year period under Massachusetts legislation to the Centre for Care and Treatment of Sexually Dangerous Persons, disclosed the following age breakdown: under 20—3; between 21 and 30—42; between 31 and 40—47; between 41 and 50—23; between 51 and 60—15 and over 60—11. Kozol, *supra* note 13, at 81. These figures are not reassuring. Clearly a more detailed assessment of the nature of the risk is required before an appropriate statutory period of maximum confinement can be arrived at.

182. *Criminal Justice Act, 1967*, c. 80 ss. 37 and 60. The act provides for extended terms upon conviction of an offence punishable with imprisonment for two years or more—to a maximum of 10 years, on the case of offences punishable by less than five years imprisonment, ss. 37(1) and 37(3). The court must be satisfied that certain conditions are met and "by reason of his previous conduct and of the likelihood of his committing further offences, that it is expedient to protect the public from him for a substantial time". *Id.* at s. 37(2). The conditions are set out in s. 37(4):
 - "Upon conviction of an offence punishable with imprisonment for two years or more
 - (a) less than three years have elapsed since the last release from prison; and
 - (b) there have been at least three convictions for serious offences (punishable with two years or more) since the age of twenty-one; and
 - (c) the aggregate of previous sentences is not less than five years; and
 - (i) on at least one of those occasions a sentence of preventive detention [now abolished] was passed; or
 - (ii) on at least two of those occasions a sentence of imprisonment (excluding non-activated suspended imprisonment) or corrective training [now abolished] was passed and of those sentences one was of three years or more or two were of two years or more."
183. See Thomas "Current Developments in Sentencing—The Criminal Justice Act in Practice" [1969] *Crim. L. Rev.* 235; Samuels, "Extended Sentences", (1970) 120 *New L.J.* 146.
184. MODEL PENAL CODE s 7.03 (Proposed Official Draft 1962).
185. MODEL PENAL CODE ss. 6.06, 6.07, and 7.03.
186. STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE (National Commission on Reform of Federal Criminal Laws, 1970), s. 3202; *see also*, WORKING PAPERS, Vol. II at 1269, *et seq.*
187. 1969 Joint Legislative Committee for Revision of the Penal Code, *Penal Revision Project* (Tent. Draft No. 2, 1968).
188. MODEL SENTENCING ACT ss. 5 and 6 (with commentary).
189. SENTENCING ALTERNATIVES AND PROCEDURES, 59-61 and 84-85. *See also* "Thomas, Current Developments in Sentencing—The Criminal Justice Act in Practice", [1969] *Crim. L. Rev.* 235, at 242-47, *supra*, fn. 74.

190. See "Professor George H. Dession's Final Draft of the Code of Correction for Puerto Rico (with annotations)", (1962) 71 *Yale L.J.* 1050, s. 85 and s. 95, at 1128-29. See also Silving, *supra* note 23, at 144. Cf. *German Penal Code*, Arts. 42e, 42f, (Am. Ser. For. Penal Codes ed., 1961)
- 190a. See NETHERLANDS PRISON SERVICE, DETENTION AT THE GOVERNMENT'S PLEASURE: TREATMENT OF CRIMINAL PSYCHOPATHS IN THE NETHERLANDS (undated); footnote 174 *supra*. Quite detailed procedures appear in *The Prisons Act*, 1951, ss. 37.
191. See *infra*. The phrase, "mental condition is gravely abnormal" which appears therein may present difficulties. Perhaps the "intellectual deficiency or emotional unbalance" language in the Maryland statute, or some other formulation, would be preferable. See *supra* note 85. The phrase "emotional unbalance" is interpreted in *Director of Patuxent Institution v. Maryland*, 221 A.2d 397 (1966).
192. This is not to suggest that these are all of the problems with the scheme as described. For example, there is the test of recidivism itself—the nature of the preceding convictions, and their frequency. Presumably the psychiatric criteria would help to fill this gap. Moreover, it would be necessary to so word the section as to avoid problems of interpretation of the kind that have occurred in England. See references cited in note 183. On the matter of the appropriate age for its imposition, see the references cited in note 181.
193. See, e.g., Radzinowicz, *supra* note 10 at 164-66.
194. See, e.g., Conrad, "Violence in Prison", (1966) 364 *Annals Am. Acad. Of. Pol. & Soc. Sci.* 113, at 118.
195. See Jobson, "Commitment and Release of the Mentally Ill Under Criminal Law", (1969) 11 *Crim. L. Q.* 186, at 197-200. After a review of cases committed to mental hospitals, the author concluded: "[I]t would appear that some scrutiny should be given the procedures by which a person is certified insane at Dorchester Penitentiary. The records suggest that federal authorities may use mental hospitals as a warehouse for troublesome prisoners about to be released on expiration of sentence." *Id.* at 199. Cf. Morris, "The Confusion of Confinement Syndrome" (1968) 17 *Buffalo L. Rev.* 651; White, Krumholz & Fink, "The Adjustment of Criminally Insane Patients: to a Civil Mental Hospital" (1969) 53 *Mental Hygiene* 34. The special problem that this presents for the inmate is suggested by the last mentioned authors on the basis of their "Operation Baxstrom" experience: "[E]arlier judgments . . . [had been] . . . that these men represented a group with higher risk for aggressive, destructive behaviour than either the criminal who had served his sentence or the psychotic requiring hospitalization. Superficially it appears that, somehow, a sum was taken of two negative labels, 'criminal' plus 'psychotic' that yielded a supernegative value of 'the psychotic criminal'. These two labels derive from two different philosophies of human behaviour and are perhaps complementary approaches to the same phenomenon. In any case, they do not have additive properties." *Id.* at 39.
196. See, e.g., *Regina v. Roberts*, [1963] 1 O.R. 280. Would this case have given rise to the controversy that it did if the issues of punishment and preventive detention had been kept separate, and if means had been available to retain the prisoner in the event that a lesser period of confinement failed to produce an amelioration of the condition that made Roberts a social danger?
197. The phrase is Morris's. See Morris, *supra* note 4, at 538. The question of stigma has been much discussed in the literature. One reference will suffice to indicate the problem that "labelling" can present: "It is generally believed that when an object is defined, the definition (attachment of a label) doesn't change the thing so defined. When human beings are defined (classified, and

so forth) the act of definition itself modifies the information setting and may thus be said to change the object (person) defined through the definition process. The self-fulfilling prophecy is a factor to be reckoned with in all aspects of criminological and penological research." Wilkins, *EVALUATION OF PENAL MEASURES* (1969) 110-11. It may be, however, that the "stigmatization" issue will simply present itself at a later stage.

198. See Kozol *et al. cit.* n. 90; McGarry and Cotton, "A Study in Civil Commitment: The Massachusetts Sexually Dangerous Persons Act", (1969) 6 *Harv. J. on Leg.* 263, at 277-83; Beyer, *op. cit.*, n. 114 at 66-74. In the American context problems have arisen from the 'mixture' of the civil and criminal processes, but this is irrelevant in Canada.
199. See note 176 and accompanying text. See also McGarry and Cotton, *supra* note 198, at 298-99 where the importance of control over intake receives special emphasis in the design of an appropriate legislative framework.
200. Cf. the situation in England under section 4 of the *Criminal Justice Act 1948*, which gives the power to make a probation order with a condition requiring the offender to submit to psychiatric treatment. The use of such orders is generally subject to the limitations that medical witnesses are able to give a firm indication that treatment will be complete and effective within the permissible period (now three years) and that the offender can be released without serious risk of a further violent offence: See THOMAS, *PRINCIPLES OF SENTENCING* (1970) at 258-261.
201. The Criminal Records Act, R.S.C. 1970, Ch. 12 (1st Suppl.), establishes a procedure whereby a person "convicted of an offence . . . may make application for a pardon in respect of that offence". (S. 3). It would not appear that the Act contemplates a pardon in respect of what in Canadian law is regarded as in the nature of a sentence or determination of status. See footnote 140 *supra*. It is possible for an "habitual criminal" or a "dangerous sexual offender" to be discharged from parole. See Parole Act, R.S.C. 1970, Ch. P-2, S. 10(d). This has sometimes been done by the National Parole Board. The effect, however, is not the same for purposes contemplated here. The point is emphasized in correspondence received by R.R. Price from Professor Peter Letkemann, dated April 25, 1974:—"As you know, there is now no way that persons once found to be habituals or D.S.O.'s can ever be relieved of this status . . . I feel strongly that there should be some provision whereby the status may be terminated . . . I am personally acquainted with several 'habitual' criminals. Some have not, to the best of anyone's knowledge, been engaged in crime for as long as ten years. The status of 'habitual criminal' is a continuing, depressing stigma, and under our current legislation, they will die with it no matter how virtuous they may become. The permanency of this label is a deterrent to rehabilitation, and an injustice to those who have demonstrated that they are indeed not 'habituals'. Legislative provision could be made whereby persons could earn the privilege of having this status formally removed . . ."

Dangerous
Sexual Offenders
in Canada

by
C. Greenland

Introduction

This paper, which presents the results of a detailed study of the records of the Canadian dangerous sexual offenders, was designed to fulfil two main objectives. The first was to provide basic information on these offenders, their offences and victims, their institutional experience and treatment, and, where applicable, their parole. Secondly, this study was designed to provide a sufficient body of data to facilitate a comparative study of a cohort of sex offenders who were not found to be DSOs. It is hoped that ultimately these studies will provide a firm basis upon which to determine whether or not the existing DSO legislation serves a useful purpose in protecting the public from harm, and, whether or not a similar degree of protection could be provided in the absence of such legislation.

Method

The detailed case records maintained by the National Parole Board on each convicted dangerous sexual offender served as the primary source of data for this study. Through the kindness of Mr. J. H. Leroux, Assistant Executive Director, and Mr. W. A. J. Attack, Coordinator of Research, Mrs. Anne Fulton, research assistant was deputed to make the relevant records available. Mrs. Fulton did this with unfailing good humor and efficiency. Ms. Rosanne Greenspan, research assistant, Law Reform Commission, shared the arduous task of abstracting data from these massive case files. Each case record was examined with a view to obtaining information on the DSO's personal characteristics, his criminal history, the nature of his present offence, the age and sex of his victim(s), and, the details of his trial process, institutional experience, treatment history, and parole.

Outline

In the first section of this paper, an attempt has been made to present a basic description of Canada's dangerous sexual offenders and their offences by providing information on the annual number of DSOs convicted in each province, the offences for which they were convicted, their age at the time of conviction, and, any previous personal and property offences recorded in their case files. The second section of the paper focuses on the victims of the DSOs, their age, sex, and provincial distribution. The final section then examines both the institutional and parole experience which has been accorded Canada's DSOs over the past 25 years.

A. The Offenders

Frequency and Provincial Distribution of Canada's DSO's

Between 1949, the year the first DSO legislation was enacted,* and 1973, a total of 98 offenders were convicted as DSO's in Canada. From 1949 until the first major amendment of the legislation in 1961, there was an average of 2.8 DSO convictions per year. This figure then climbed to an annual average of 5.5 cases between 1962 and 1969 (inclusive), and fell following a further amendment in 1969 to 4.3 new cases per year.

As can be seen from the accompanying table, the largest number of DSO convictions occurred in British Columbia and Ontario, these two provinces accounting for 39% and 29% respectively, of all DSO convictions in Canada. In sharp contrast, there have been no DSO convictions in either Newfoundland or New Brunswick.

A slightly different perspective is obtained when one considers the relationship between the number of DSO's convicted in each province and the total number of convictions for sexual offences which have taken place in that province. Whereas the number of DSO convictions in British Columbia accounted for approximately 1.8% of all convictions for sexual offences in that province, in Ontario, DSO convictions were responsible for less than one-half of one per cent of these convictions.

See Tables 1 and 1A, pages 259 and 260.

*See (Appendix I) for a brief history of DSO legislation in Canada and a summary of the present DSO provisions.

Current Offences Committed by DSO's

Almost two-thirds (62%) of the convictions leading to a DSO finding were for heterosexual offences. Among these, indecent assault female (33 cases) and rape and attempted rape (20 cases) were the most frequent offences, accounting for 52% and 31% respectively of all heterosexual offences. Indecent assault male (18 cases) and gross indecency (14 cases) were the most frequent among the homosexual offences, accounting for 47% and 37% respectively of all such offences.

Although the frequency distributions of the 'offence-types' varied from province to province, at least 50% of the DSO convictions in each province, except the Yukon and Northwest Territories, were for heterosexual offences, this proportion rising to 100% in Prince Edward Island, Nova Scotia, and Saskatchewan. All six of the convictions in the Yukon and Northwest Territories were for homosexual offences.

See Tables 2 and 3, pages 261 and 262.

Relationship Between Age of DSO at Time of Conviction and Types of Current Offence Committed

As can be seen from the cumulative frequency distribution in Table 3, heterosexual offenders as a group were consistently younger than homosexual offenders. In fact, whereas 13.2% of the homosexual offences (5 offences) were committed by DSOs who were sixty years of age and over, not one heterosexual offence was committed by a DSO (known to be) in this age group.

The data also indicate that DSOs convicted of rape or attempted rape tended to be younger than those involved in other sexual offences. Whereas three-quarters (12 cases) of those convicted of rape or attempted rape were under 35 years of age, only 58% (19 cases) of those convicted of indecent assault female fell within this category, and, less than half (44%, 4 cases) of those convicted of sexual intercourse with a female under fourteen, attempted sexual intercourse with a female under fourteen, carnal knowledge, or attempted carnal knowledge, were under 35. As can be seen from the accompanying table, this percentage falls even further when one considers each of the homosexual offences.

Previous Personal and Property Offences Committed by DSO's

As can be seen in the following two tables, five per cent of the 97* DSO's were first offenders** and 13 per cent had a history of only one previous personal or property conviction. Three of the first offenders were from Ontario, ranging in age from 17 to 51.

Whereas over half of the DSO's had never been convicted of property offences, only five offenders had no previous convictions for offences against persons. Of the 43 DSO's who had a history of property offences, four had been convicted of 10, 13, 15 and 23 property offences respectively. These men had each been convicted of between one and five personal offences as well. This mixed pattern of previous property and sexual offences has also been observed in studies of DSO's in Holland and England.

Almost 95% of the DSO's (92 men) had been convicted of at least one previous offence against a person. Over three-quarters of these men (84 percent, 81 men) had between one and five such convictions. Of these, the majority had been convicted of either one or two previous personal offences. Three DSO's had been convicted of 13, 15 and 18 offences respectively.

See Tables 4 and 4A, pages 263 and 264.

* Previous offences committed by one DSO were not available.

** For excerpts from the case records of these first offenders, see Appendix 2.

B. The Victims

The Age, Sex, and Provincial Distribution of the DSO Victims

Almost two-thirds of the victims of sexual assaults by DSO's were female. Of these, almost one-half were young girls under the age of 12. An additional 23% were between 12 and 15 years of age. When considering the age distribution of the 35 male victims, however, it was found that one-fifth of the victims were under 12 while almost two-thirds were between 12 and 15.

In examining these age patterns, it may prove most instructive to compare the above results with the findings of Dr. Freund and his colleagues who conducted a study on 98 Ontario sex offenders.¹ Eighty-seven (88.8%) of the offenders observed by Dr. Freund were charged with heterosexual offences. Almost one-third (32.2%) of these (heterosexual) offenders had been involved with young girls under the age of 12, and an additional 37% had been involved with girls between the ages of 12 and 15 (inclusive). After a detailed study of these offenders, Dr. Freund concluded that about 42% of the 98 offenders surveyed, "may be quite safely supposed deviant in their sexual preferences". From the results discussed thus far, one could conclude that approximately one-half of Canada's DSO's could similarly be regarded as "sexually deviant" and subject to treatment. The remainder of the DSO's, however, appear to have an impulsive life-style which includes unlawful and antisocial behaviour such as stealing and fighting in addition to committing sexual assaults. See Table 5, page 265.

¹Freund, K., Seeley, H. R., and Marshal, W. E., "Sexual Offenders Needing Special Assessment and/or Therapy", *Canadian J. Crim. and Corr.* Volume 10, p. 345-365.

The Relationship Between the Victim's Age and Sex and the Age of the DSO

As can be seen in Table 6, the sexual preference for young girls which was observed in the previous section was not limited to any specific DSO age range. There appears to have been a slight tendency, however, for these DSO's to be between the ages of thirty and forty-four.

Similarly, the ages of the DSO's who demonstrated a sexual preference for boys between twelve and fifteen were fairly randomly distributed, with only a slight concentration in the 35-49 year age bracket. See Table 6, page 266.

C. Institutional and Parole Experiences

The Number of DSO's Paroled, the Years Served Prior to Parole, and, the Number of Parole Revocations

As of 1973, 34% (31) of Canada's DSO's had been paroled following varying periods of incarceration. Over half of these men (54.8%, 17 men) had been imprisoned for six to ten years and an additional 29% (9 men) had served between 11 and 15 years before being paroled. The longest period of imprisonment before parole was served by a man who, after committing four previous offences, was convicted of indecently assaulting a female. He was imprisoned for 15 years, 10 months, and 17 days. A forty-three year old man convicted of indecently assaulting boys under 15 served 2 years, 11 months, and 21 days, the shortest period recorded before the granting of parole to a DSO.

Slightly more than half of the DSO's paroled made successful adjustments. However, 13 (41.9%) had their paroles revoked or suspended once, and, in two cases (6.5%), paroles were revoked twice. In addition, three men died while on parole.

See Table 7, page 267.

The Number of Years Served by Non-Paroled DSO's

As of 1973, approximately two-thirds of Canada's DSO's (60 men) had never been paroled. Over half of these men (61.7%, 37 men) had already served between six and fifteen years and, an additional 10% (6 men) had been imprisoned for over 16 years. Two DSO's had been incarcerated for more than 20 years*, and three were transferred to mental hospitals. It

should also be noted that of the three DSO's who died while in custody, one was killed by other inmates during a penitentiary riot.

As prolonged periods of incarceration (which are inevitably destructive in themselves) are almost invariably associated with poor adjustment in the outside community, the DSO who has not been paroled within the first ten years of his imprisonment, faces considerably diminished prospects of being selected for release. However, the above statistics would tend to indicate that the National Parole Board has followed a restrictive policy of release.

See Table 8, page 268.

* See Appendix 3 for excerpts from case records.

Possible Relationships Among the Age and Sex of DSO Victims and the Number of Years Served by the DSO

Although previous sections of this paper have presented information on the age and sex of the DSO victims, the number of years served by the DSO, and, the number of parole revocations, it was felt that it may prove interesting to examine any possible interaction among these variables. As this paper was designed to provide basic descriptive information concerning the DSO's, no statistical analysis of this data has been undertaken. However, it is hoped that by including this set of data, further research into possible relationships among these four variables will be stimulated.

See Tables 9 and 10, pages 269 and 270.

TABLE 1

Year of D.S.O. Conviction by Province+

PROV.	1949	1950	1951	1952	1953	1954	1955	1956	1957	1958	1959	1960	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	TOTAL
B.C.	2				3	1	1		1	2	1	1	1	4	2	2*	3	5	5	2**	4*	2*	2	1		38
Ont.			1		3		1	3					2		1	3	1	2	1			1	1			28
P.Q.	1		2										1					1	1*			2	1			10
Alta.			1		2			1								1		1				1	1		1	8
Sask.								2								1		1				1				4
N.W.T.	***		1			1								1		1		1								4
N.S.																1						1*	1			4
Man.																										3
P.E.I.								1																		2
TOTAL	3		5		8	3	2	7	1	2	2	1	3	5	3	9	4	9	7	3	4	6	6	4	1	98

*Note. No cases from Newfoundland or New Brunswick; seven quashed cases included.

* Includes one quashed case.

** Includes two quashed cases.

*** Includes one conviction in the Yukon.

TABLE 1A

DSO Convictions as a Percentage of Convictions
for Sexual Offences (1949-1968)*

Yukon and N.W.T.	3.48%
P.E.I.	2.78%
B.C.	1.83%
Sask.51%
Ont.34%
N.S.14%
P.Q.12%
Man.11%

*The statistics for some of the provinces were available for these years only.

Source: Statistics Canada, "Statistics of Criminal and Other Offences" 1949-1968, Cat. No. 85-201.

TABLE 2

Current Offences of DSO's by Province

PROVINCE	Heterosexual Offences										Homosexual Offences				GRAND TOTAL	
	Rape	Att. Rape	Ind. Ass.	Fem.	S.I.—14	Att. S.I.—14	Carn. Know.	Att. Carn.	Know.	Contrib. J.D.	Total	Sodomy & Bug.	Ind. Ass. M.	Gross Ind.		Total
B.C.	7	1	11		3		2				24	2	6	6	14	38
Ont.	2	3	12			1	1				19		7	3	10	29
P.Q.	3		2								5	2	2	1	5	10
Alta.	3		2							1	6		1	1	2	8
Sask.			3		1						4					4
N.W.T.*																6
N.S.			2					1			3	1	2	3		6
Man.			1								1	1			1	3
P.E.I.	1										1					2
TOTAL	16	4	33		4	1	3	1	1	1	63	6	18	14	38	101**
% of all Heterosexual Offences	25	6	52		6	2	5	2	2	2	100	—	—	—	—	—
% of all Homosexual Offences	—	—	—	—	—	—	—	—	—	—	—	16	47	37	100	—

* Includes one conviction in the Yukon.

** Multiple offences are included.

TABLE 3

Age at D.S.O. Conviction by Current Offences

Heterosexual Offences													Homosexual Offences					GRAND TOTAL	
AGE AT CONVICTION	Rape		Att. Rape	Ind. Ass. F.	S.I.—14	Att. S.I.—14	Carn. Know.	Att. Carn. Know.	Contrib. J. D.	Total	Percent	Cum. Percent	Sodomy & Bug.	Ind. Ass. M.	Gross Ind.	Total	Percent		Cum. Percent
	20 or Under	1	1	3		1				6	9.5	9.5				2	5.3	—	6
21-24	5	1	5				1			12	19.0	28.5		2	2	5	13.2	5.3	14
25-29	5		5							10	15.9	44.4	1	2	2	4	10.5	18.5	15
30-34	1	1	6	1	1	1				11	17.5	61.9	1	2	1	7	18.4	29.0	15
35-39	2		2	1						5	7.9	69.8	2	2	3	7	18.4	47.4	12
40-44	1		6	1						8	12.7	82.5	1	4	2	7	18.4	65.8	15
45-49		1	1	1						3	4.8	87.3	1	2	2	5	13.2	79.0	8
50-54			2							2	3.2	90.5		1	1	2	5.3	84.3	4
55-59			3				2			5	7.9	98.4			1	1	2.5	86.8	6
60 or Over												98.4	3	2	2	5	13.2	100.0	5
N.K.	1									1	1.6	100.0						100.0	1
TOTAL	16	4	33	4	1	3	1	1	1	63	100.0		6	18	14	38	100.0		101*

* NOTE: Multiple offences are included.

TABLE 4

Number of Previous Personal and Property Offences by Provinces
Previous Offences

Province	Personal						Property						TOTAL
	0	1	2-5	6-10	Over 10	NK	0	1	2-5	6-10	Over 10	NK	
B.C.	1	8	20	6	3		20	6	7	4	1		38
Ont.	3	4	18	3			16	6	5	1			28
P.Q.		2	6	2			3	2	1	3	1		10
Alta.		2	5	1			6	1			1		8
Sask.		1	2	1			3				1		4
N.W.T.	1	2	1				4						4
N.S.		2				1	1	1				1	3
Man.			1	1			1	1					2
P.E.I.			1					1					1
TOTAL	5	21	54	14	3	1	54	18	13	8	4	1	98
PER CENT	5	22	55	14	3	1	55	19	13	8	4	1	100

Number of Previous Personal and Property Offences Committed by Each DSO

Over	10	9	8	7	6	5	4	3	2	1	0	TOTAL
10	1	1	1	1	1	1	1	2	2	2	1	5
9												21
8												28
7												13
6												11
5												8
4												5
3												3
2												2
1												4
0												12
TOTAL	5	21	28	13	11	8	5	3				97*

No. of Personal Offences Committed by each DSO

*Previous Offences Committed by One DSO Not Known.

TABLE 5

Showing Victims by Sex, Age and Province

Victims

Province	Females						Males					
	Ages						Ages					
	Under 12	12-15	16 & Over	NK	Total	Per Cent	Under 12	12-15	16 & Over	Total	Per Cent	GRAND TOTAL
P.E.I.		1			1	1.5						1
N.S.	1		1	1	3	4.5						3
P.Q.	2		3		5	7.5	1	2	2	5	14.3	10
Ont.	12	4	4		20	30.3	3	5	1	9	25.7	29*
Man.	1				1	1.5		1		1	2.9	2
Sask.	2	2			4	6.0						4
Alta.	1	2	4		7	10.7		1		1	2.9	8
B.C.	11	6	8		25	38.0	3	11	1	15	42.8	40*
N.W.T.**								3	1	4	11.4	4
TOTAL	30	15	20	1	66	100	7	23	5	35	100	101

* Cases with 2 victims—boys and girls—included.

** Includes one conviction in the Yukon.

TABLE 6
Showing Victims Age and Sex by Age of DSOs

Sex and Age Of Victims	Age of DSO											TOTAL
	Under 20	21-24	25-29	30-34	35-39	40-44	45-49	50-54	55-59	60 & Over	N. K.	
Fem. Under 12	2	4	3	7	4	4	2	1	3			30
12-15	1		2	5		3	1		2	1		15
16 & Over	3	8	4		2	2		1			1	21*
Total	6	12	9	12	6	9	3	2	5	1	1	66
Male Under 12		1	2		2	1		1				7
12-15		1	2	2	3	5	4	1	1	4		23
16 & Over			2	1	1		1					5
Total		2	6	3	6	6	5	2	1	4		35
GRAND TOTAL	6	14	15	15	12	15	8	4	6	5	1	101**

* One female victim with age not known.

** Multiple victims involved in some cases.

TABLE 7

Number of DSO's Paroled, Years Served, and
Number of Parole Revocations by Province

PROVINCE	DSO's	Paroled	% paroled	Years Served Before Parole					No. of Parole Revocations		
				2-5	6-10	11-15	Over 15		0	1	2
B.C.	33	11	33	1	4	4	2		7	3	
Ont.	28	9	32		6	3 ^b			4	6	1
P.Q.	9	3	33		2 ^c	1			1	1	1
Alta.	8	2	25	1 ^d		1				1	
Sask.	4	1	25		1					1	
N.W.T.*	4	4	100	1	3 ^c				4		
N.S.	2	1	50		1					1	
Man.	2										
P.E.I.	1										
TOTAL	91 ^a	31	34	3	17	9	2		16	13	2
Per Cent				9.7	54.8	29.0	6.5		51.6	41.9	6.5

a 7 Quashed cases excluded

b Died on Parole: 13,10.71 Age: 55 Confined: 10+ years. Paroled: 9 yrs.

c Died on Parole: 25,06.61 Age: 72 Confined: 7+ years. Paroled: 1+ yrs.

d Died on Parole: 22,11.58 Age: 82 Confined: 4+ years. Paroled: 10 yrs.

e Parole revoked twice. Died in custody 7.3.71. Age: 47 Confined: 20

* Includes one conviction in the Yukon.

TABLE 8

Province and Number of Years Served by DSO's not Paroled

Years Served by DSO's Never Paroled

Province	TOTAL DSO's	0-5	6-10	11-15	16-20	Over 20	TOTAL
B.C.	33	5	14	2		1	22
Ont.	28	3a	8b	6e	2		19
P.Q.	9	4	1	1d			6
Alta.	8	3f	1	1c		1	6
Sask.	4	1	1		1		3
N.W.T.*	4						
N.S.	2	1					1
Man.	2		2				2
P.E.I.	1				1		1
TOTAL	91	17	27	10	4	2	60
Per Cent		28.3	45.0	16.7	6.6	3.4	100

a Died in custody:

b Killed in custody:

c Died in custody:

d In mental hospital

e In mental hospital

f In mental hospital

*Includes one conviction in the Yukon.

2.7.57 Age: 60 Served: 4+ years

18.4.71 Age: 36 Served: 8+ years

2.3.71 Age: 63 Served: 14+ years

Age: 37 Served: 13+ years

Age: 50 Served: 10+ years

Age: 32 Served: 3+ years

TABLE 9

Victims Sex and Age and Years Served by Never-Paroled DSO's

Sex and Age of Victims	TOTAL DSO's	Years Served by DSOs Never Paroled					TOTAL
		0-5	6-10	11-15	16-20	Over 20	
Fem. Under 12	30	4	9	7	1	2	23
12-15	15	1	4	1	1		7
16 & Over	21	7	7				14
TOTAL	66	12	20	8	2	2	44
Male Under 12	7	3*			1		4
12-15	23	1	7*	1	1		10
16 & Over	5	1		1			2
TOTAL	35	5	7	2	2		16
GRAND TOTAL	101*	17	27	10	4	2	60
Per Cent		28.3	45.0	16.7	6.6	3.4	100

* Multiple victims involved in some cases.

TABLE 10
Victims Sex and Age by Years Served Before Parole and
Number of Parole Revocations

Sex and Age of Victims	Years Served Before Parole				No. of Parole Revocations		
	2-5	6-10	11-15	Over 15	TOTAL	0	1 2
Fem. Under 12		4	2		6	2	4
12-15		2	2	1	5	3	2
16 & Over		3	2		5	2	3
TOTAL		9	6	1	16	7	9
Male Under 12		2	1		3	1	1 1
12-15	3	4	1	1	9	7	2
16 & Over		2	1		3	1	1 1
TOTAL	3	8	3	1	15	9	4 2
GRAND TOTAL	3	17	9	2	31	16	13 2
Per Cent	9.7	54.8	29.0	6.5	100	51.6	41.9 6.5

Appendix 1

The History of DSO Legislation in Canada

The first provisions concerning dangerous sexual offenders in Canada were established in a 1948 statute relating to 'criminal sexual psychopaths'¹. This Act, which was modelled on the existing Massachusetts legislation², provided that, in the case of any person who was convicted of indecent assault on a male or female, rape or attempted rape, or, carnal knowledge or attempted carnal knowledge, the court may, upon application, hear evidence from at least two psychiatrists as to whether or not the offender was a criminal sexual psychopath. The statute defined a 'criminal sexual psychopath' to mean,

a person who by a course of misconduct in sexual matters has evidenced a lack of power to control his sexual impulses and who as a result is likely to attack or otherwise inflict injury, loss, pain or other evil on any person³.

If it was determined that the accused fell within this category, the Court was required to impose a sentence of at least two years imprisonment for the offence for which he had been convicted as well as a sentence of preventive detention to be served in a penitentiary. Provisions were also established concerning the evidence to be presented, conditions of the DSO's confinement, and the required reviews by the Minister of Justice.

Although this statute was later revised and extended to include persons convicted of buggery, bestiality, gross indecency, or an attempt to commit any one of these offences⁴, by 1955 the law concerning criminal sexual psychopaths had been severely criticized. It was felt that the legislation was ineffective as a result of the procedural difficulties and the high standard of proof required to obtain a conviction.⁵ A Royal Commission was therefore appointed, "to inquire into and report upon the question

whether the criminal law of Canada relating to criminal sexual psychopaths should be amended in any respect, and, if so, in what manner and to what extent".⁶

Following the Commission's Report in 1958, the legislation was amended considerably. As recommended by the Commission, a less technical definition and description of the type of offender with whom the law was attempting to deal was adopted. This resulted in the offender (now referred to as a "dangerous sexual offender") being defined as a person who,

by his conduct in any sexual matter, has shown a failure to control his sexual impulses, and who is likely to cause injury, pain or other evil to any person, through failure in the future to control his sexual impulses or is likely to commit a further sexual offence.⁷

A primary objective underlying this change in definition was to "make it clear" that the Court could convict on the basis of only one offence. For, both the Commission and Parliament felt that, "in dealing with offences that were potentially dangerous and damaging to others, it should not be necessary to wait until there is a second or subsequent offence".⁸ This amendment was also designed to remove the extreme difficulties involved in proving the offender's *lack of power* to control his sexual impulses. It was now necessary to show only the accused's *failure* to control these impulses.⁹ Finally, the doubts which had arisen concerning whether or not the phrase "inflict injury" made it necessary to show an element of coercion were dispelled by the replacement of the word "inflict" with the word "cause" in the definition. Parliament also extended the period of time within which an application to have a person declared a DSO could be made to up to three months following conviction, providing the sentence was still in effect. In addition, it was no longer necessary for the Court to sentence the accused to a determinate period. However, the Minister of Justice was now obliged to review the condition, history and circumstances of each DSO once every year rather than once every three years.

Following the Supreme Court decision in the *Klippert* case,¹⁰ which held that the "further sexual offence" referred to in the definition of a DSO need not be one which would cause injury, pain, or other evil to another person, the DSO provisions were restricted slightly. The new legislation eliminated the phrase, "or is likely to commit a further sexual offence" from the DSO definition.¹¹

*Present DSO Legislation*¹²

The present DSO legislation includes the following relevant provisions.

687. In this Part

“dangerous sexual offender” means a person who, by his conduct in any sexual matter, has shown a failure to control his sexual impulses, and who is likely to cause injury, pain or other evil to any person, through failure in the future to control his sexual impulses;

“preventive detention” means detention in a penitentiary for an indeterminate period.

688. (1) Where an accused has been convicted of

(a) an offence under section 144, 146, 149, 155, 156 or 157* or

(b) an attempt to commit an offence under a provision mentioned in paragraph (a), the court shall, upon application, hear evidence as to whether the accused is a dangerous sexual offender.

(2) On the hearing of an application under subsection (1) the court shall hear any relevant evidence, and shall hear the evidence of at least two psychiatrists, one of whom shall be nominated by the Attorney General.

(3) Where the court finds that the accused is a dangerous sexual offender it shall, notwithstanding anything in this Act or any other Act of the Parliament of Canada, impose upon the accused a sentence of preventive detention in lieu of any other sentence that might be imposed for the offence of which he was convicted or that was imposed for such offence, or in addition to any sentence that was imposed for such offence if the sentence has expired.

690. (1) The following provisions apply with respect to the applications under this Part, namely,

(b) an application under subsection 689(1) shall not be heard unless seven clear days notice thereof has been given to the accused by the prosecutor either before or after conviction or sentence but within three months after the passing of sentence and before the sentence has expired, and a copy of the notice has been filed with the clerk of the court or with the magistrate, where the magistrate is acting under Part XVI.

(2) An application under this Part shall be heard and determined by the court without a jury.

691. (1) The accused shall be present at the hearing of an application under this Part and if at the time the application is to be heard

(a) he is confined in a prison, the court may order, in writing, the person having the custody of the accused to bring him before the court; or

(b) he is not confined in a prison, the court shall issue a summons or a warrant to compel the accused to attend before the court and the provisions of Part XIV relating to summons and warrant are applicable *mutatis mutandis*.

(2) Notwithstanding subsection (1) the court may

(a) cause the accused to be removed and to be kept out of court, where he misconducts himself by interrupting the proceedings so that to continue the proceedings in his presence would not be feasible; or

(b) permit the accused to be out of court during the whole or any part of the hearing on such conditions as the court considers proper.

692. Without prejudice to the right of the accused to tender evidence as to his character and repute, evidence of character and repute may, where the court thinks fit, be admitted on the question whether the accused is or is not a dangerous sexual offender.

693. An accused who is sentenced to preventive detention may be confined in a penitentiary or part of a penitentiary set apart for that purpose and shall be subject to such disciplinary and reformatory treatment as may be prescribed by law.

694. Where a person is in custody under a sentence of preventive detention, the National Parole Board shall, at least once in every year, review the condition, history and circumstances of that person for the purpose of determining whether he should be granted parole under the Parole Act, and if so, on what conditions.

695. (1) A person who is sentenced to preventive detention under this Part may appeal to the court of appeal against that sentence on any ground of law or fact or mixed law and fact.

(2) The Attorney General may appeal to the court of appeal against the dismissal of an application for an order under this Part on any ground of law.

(3) On an appeal against a sentence of preventive detention the court of appeal may,
(a) quash such sentence and increase any sentence that might have been imposed in respect of the offence for which the appellant was convicted, or order a new hearing; or
(b) dismiss the appeal.

(4) On an appeal against the dismissal of an application for an order under this part of the court of appeal may

(a) allow the appeal, set aside any sentence imposed in respect of the offence for which the respondent was convicted and impose a sentence of preventive detention, or order a new hearing; or

(b) dismiss the appeal.

(5) A judgment of the court of appeal imposing a sentence pursuant to this section has the same force and effect as if it were a sentence passed by the trial court.

(6) The provisions of Part XVIII with respect to procedure on appeals apply, *mutatis mutandis*, to appeals under this section.

* The Offences referred to in section 689(1)(a) are:

s. 144, rape,

s. 146, sexual intercourse with a female,

(1) under 14,

(2) between 14 and 16,

s. 149, indecent assault on female,

s. 155, buggery or bestiality,

s. 156, indecent assault on male,

s. 157, gross indecency.

Footnotes

1. 11-12 Geo. VI (1948), c. 39, s. 43.
2. House of Commons, *Debates*, 1948, p. 5197.
3. 11-12 Geo. VI (1948), c. 39, s. 43.
4. Canada Royal Commission on the Criminal Law Relating to Criminal Sexual Psychopaths, *McRuer Report*, Queen's Printer, Ottawa, 1958, p. 12.
5. *Ibid*, p. 15.
6. *Ibid*, p. x.
7. Statutes of Canada, 1960-61, Chapter 43.
8. House of Commons, *Debates*, 1961, p. 6537.
9. *Ibid*, p. 6537.
10. *Kippert v. The Queen* [1967] S.C.R. 822.
11. Statutes of Canada, 1968-69, Chapter 38.
12. R.S.C. 1970 c. C-34.

Appendix 2

The following are excerpts from the case records of the five DSO's who were first offenders.

Case No. 1, age 47, a chronic alcoholic, was charged with attempted carnal knowledge and indecent assault female. The victims were girls age 4 and 7. "He touched their privates . . . There was some redness but no attempt at penetration".

Parole, granted after 8 years of incarceration, was suspended after one month. He was found in a car with children, but no charges were proffered. Parole was granted again in the following year. He has now been free for six years.

Case No. 2, age 17, charged with sexual intercourse with female under 14 and assault causing bodily harm. Victim, girl age 8, had bruises and swelling on buttocks, teethmarks on shoulder, redness and swelling of vagina due to attempted penetration. He was also accused of indecent assault on boys age 6, 8 and 10. He hit them with a stick but the charges were dropped. Diagnosis: "Abnormal sexual impulses. Not a mental defective and not mentally ill". After twelve years of incarceration he was released on parole to a mental hospital. He suffers from a "habitual dependence response".

Case No. 3, age 51, single university graduate. Ten charges of indecent assault male. "Not violent or aggressive—just a homosexual pedophile". Victims: fellatio with boys age 14, 15 and 16. Served 9 years and 8 months before parole.

Case No. 4, age 51. Low I.Q., Grade I education, illiterate, Charged with gross indecency. Victim: son age 14. "Fellatio and buggery. Not dangerous, not suitable for treatment". Incarcerated for 7 years before parole.

Case No. 5, age 26, single man of average intelligence. Five charges of buggery and five of gross indecency. "Homosexual pederast with Indian and Eskimo school boys age 15-16. No violence". Served 8 years, 10 months before parole.

Appendix 3

Below are excerpts from the case records of the two DSO's who have been incarcerated for more than twenty years.

Case No. 1, age 31 was convicted for 'carnal knowledge' in 1953. He assaulted a 10 year old girl in the presence of her 8 year old brother. He took them in a van and placed his penis between her legs but made no attempt at penetration. Has a long history of theft, vagrancy, indecent exposure, indecent acts, contributing to juvenile delinquency etc. since the age of 17.

Case No. 2, age 31 was convicted of indecent assault in 1951. He took a 6 year old girl to a secluded spot and "played with her privates five times". He had a mental age of 12 and a grade 6 education. Starting at age 18 he has five previous convictions for sexual offences.

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IMPRISONMENT AND RELEASE

Working Paper 11

Table of Contents

	PAGE
Foreword	1
1. Introduction	5
2. Aims of Sentencing	9
3. Reasons for Imprisonment	11
4. Who Decides the Sentence?	15
5. Guidelines for Imprisonment	17
6. Length of Prison Terms	21
7. Exceptional Cases	27
8. Conditions of Sentence and Release Procedures	33
9. The Sentence Supervision Board	41
10. Conclusion	45

Foreword

This paper, which focuses on one of the law's most drastic dispositions, imprisonment, is the eleventh working paper to be published by the Commission. Like those before it, it can be seen as a separate unit, standing on its own. We suggest, however, that it would be far more satisfying to view this paper as one in a series of working papers on the Criminal Law, and that it should be read in the light of these previous works. For, as the number of working papers increases, it is simply not possible to reiterate in detail all the assumptions that have previously been made and that have contributed to the development of our proposed position.

In addition, failure to view this paper as one in a series of working papers may result in some unexpected—and perhaps unfortunate—consequences. Our criminal justice system is an extremely complex one. A change in one area of the law may seriously affect many other parts of the system. Unless we are continually aware of these interdependencies, we are in danger of introducing changes that may have totally different consequences than those we intended—consequences that may not be at all appropriate to the aims and purposes of our system.

However, before we can evaluate the effects of these changes, we must first establish exactly what the aims and purposes of our criminal justice system are. We, as a society, must develop a common understanding of its meaning and limits. This, in effect, is what our series of working papers has struggled to provide.

In our working papers on *The Meaning of Guilt* (#2) and *The Limits of the Criminal Law* (#10), the basic prin-

ciples of criminal law were discussed. The meaning and nature of the criminal process was examined in *Discovery* (#4). And the fundamentals of sentencing and punishment were treated in *Principles of Sentencing and Dispositions* (#3) which was followed by proposals on *Restitution and Compensation* (#5), *Fines* (#6) and *Diversion* (#7). We also have published more detailed studies on related topics.

Quite clearly all these papers have a bearing on our present subject: *Imprisonment*. No subject in the criminal law is more important: today it is, in practice, the last resort of both our criminal and civil sanctions. For this reason, readers of this paper should bear in mind the conclusions reached in Working Paper #2:

that all serious, obvious and general criminal offences should be contained in the Criminal Code, and should require *mens rea*, and only for these should imprisonment be a possible penalty; and that all offences outside the Criminal Code should as a minimum allow due diligence as a defence and for these in general imprisonment should be excluded. (p. 38)

Working Paper #3 then analyzed the traditional reasons for sentences. It looked at punishment, deterrence and rehabilitation. Applied to imprisonment, it found that these concepts had become questionable and problematic and were no longer able to serve as guiding criteria. The thrust of the paper was towards reconciliation with the community, a thrust which was carried further in Papers #5, 6 and 7.

Working Paper #10, in exploring the limits of the criminal law reminds us of what we easily forget: "The best things in life may well be free, the rest must all be paid for. In our world everything costs something, and law is no exception." In the light of the guiding principle of maximization of freedom (for everyone) there is a loss of freedom not only through crime but through the criminal law itself and, in weighing what should be a criminal offence, this balance must be the principal deciding factor. Not all forms of wrongdoing, such as certain forms of lying, breaking promises or other matters of common morality, can be made crimes. There has to be harm involved, but not all harms can constitute crimes either

or we would have to stop doing things like driving automobiles. Harms have to be linked to core values and in fact the criminal law should constitute an articulation of these core values and the criminal process should be a demonstration of them.

Before coming to the views expressed in this paper on the place of imprisonment in the structure of sanctions, we have also analyzed, to the extent possible, the present system. These studies will be released as background papers and pay particular attention to present special problem areas such as dangerous sexual offenders, habitual criminals and present release procedures. This working paper reflects the findings of these studies although it does not give the details. Needless to say, much of the literature and experience in other jurisdictions was also examined before coming to the present proposal. It is also clear from the paper that a great deal of further detailed work has to be undertaken before a proposal such as this can be translated into legislative and practical reality. Before undertaking such work, however, the Commission wants to assure itself that the basic thrust of the paper is sound and it strongly urges the public to respond to the proposals.

Introduction

In Canada, imprisonment as we understand it today dates back only to 1835 with the building of the Kingston Penitentiary. The penitentiary sentence was an American invention, having been introduced by the Philadelphia Quakers in 1789 as a more humane alternative to the harsh punishments of the day. The Quakers felt that a sentence of imprisonment served under conditions of isolation with opportunities for work and religious contemplation would render the offender penitent and reformed. In New York the penitentiary sentence was adopted not out of religious motives but out of a belief that work and training in the penitentiary would lead to a reduction in the overall crime rate. The penitentiary sentence in the form of long terms of imprisonment then spread to England as an alternative to exile and transportation of offenders to the colonies. While Canadian law followed the English model, prison institutions were influenced by developments in the United States.

Depending on the temper and outlook of the times imprisonment, then, has been justified on many bases: the promotion of religious objectives, the provision of work and training for the criminal, and more recently, the deterrence and rehabilitation of the offender. While failing to achieve any of these objectives in any measurable sense, it is apparent that imprisonment does serve as a means of denouncing certain behaviour in very strong terms and it also serves as a place of exile. When not used with restraint, imprisonment continues

to give expression to latent vengeance or to serve as a dumping ground for minor social problems.

In Canada today, on any one day, roughly one in every 1,000 residents is serving time in a penal institution—a total of 20,000 imprisoned adult offenders. Although statistics are inaccurate on this subject, it is estimated that over 75,000 persons are incarcerated each year either in federal penitentiaries, in provincial institutions or in municipal jails.

Close to one-half of the 4,000 persons sent to penitentiaries each year are serving sentences for having committed non-violent offences against property or the public order. Indeed, less than 20 percent of offenders are imprisoned for committing acts of violence against the person. Statistics reveal similar results in respect of provincial institutions.

Almost 50 percent of prisoners in some provincial institutions were imprisoned because they could not pay fines.

A study by the Commission showed that one out of every seven persons appearing in court for the first time in Canada and convicted of a non-violent offence against property was imprisoned. On a second conviction for a non-violent property offence almost 50 percent of offenders were imprisoned. In the light of this type of information we must ask, what do we hope to accomplish by using imprisonment?

Far from having fulfilled its humanitarian expectations, imprisonment today is seen to be a costly sanction that ought only to be used as a last resort. It is costly to society, to the prisoners and to the guards and prison officials as individuals. How do these costs manifest themselves? To keep a person in a prison costs around \$14,000 a year depending upon the nature of the institution. In addition there are the indirect costs arising out of welfare and increased social services to the prisoner's family. It is difficult to see how an expenditure of \$14,000 can be justified unless the harm done is correspondingly high and cannot be paid back except through imprisonment.

Industrial work or its equivalent is not common even in the larger penitentiaries. Less than seventeen percent of

federal inmates are engaged in industrial work. Because prisons tend to be remote and closed institutions, prisoners are often cut off from work and from the usual education and manpower training programs in the community.

The prisoner, unlike the free citizen, is not engaged in the regular work process; hence in federal institutions, wages rarely exceed \$13.50 a month. The prisoner is not expected to pay taxes as free citizens do, or to pay restitution or fulfill other obligations expected of citizens. In undermining the offender's self-image and depriving him of the opportunities to help sustain his family, pay his debts and contribute to unemployment and pension funds, prisons add to the burdens of society as a whole.

The psychological depression and the anxiety that can be induced by the first few months of imprisonment have been well described in the literature. News reports of suicides and attempted suicides and of violence in prisons give further reality to another aspect of the pressures of prison life.

The effect of all of this on the prison guards and administration cannot be overlooked. What does imprisonment do not only to the captive but to the captor? What social and psychological forces press upon his personality? Are these sufficiently recognized as a cost that society passes on to the prison worker and his family?

There is another and more pervasive cost of imprisonment as presently organized. It tends to generate a lessening of respect for the administration of justice. This loss of respect arises from several causes. Various statutes deal with imprisonment in different ways and fragment decision-making powers relating to sentencing; in part the courts have a say, in part the prison officials have a say, and in part the parole authorities have a say. The problem is that the various statutes do not reflect a common or coherent philosophy. The community hears conflicting statements about what imprisonment is supposed to mean. In the result the public is confused when the judge gives a sentence for a specific time and the offender reappears much earlier in the street. In

fact, some judges also feel thwarted, as do the police. There is a need to clarify what we mean by imprisonment.

Loss of respect arises as well from the closed nature of the prison or correctional system. It lacks sufficient visibility and public accountability. Decision-making in corrections until recently was generally beyond outside review and complaints about unfairness were handled by the correctional branch in its own setting.

At the same time it is known that while the officials are in charge of penal institutions, it is at least partially true that large security prisons can only be run with the co-operation and tacit consent of the prisoners. There are understood limits beyond which the administration may go only at its peril. Yet the almost invisible and non-accountable nature of the prisoners' power results in tension, coercion and injustice within the institutions.

Perhaps these costs are inevitable as long as imprisonment means a place: putting people in boxes and keeping them there. Yet, if imprisonment means sending a person to a place of exile initially, but, depending on the purpose of the sentence, with a clear expectation that part of the sentence will be spent under varying conditions of work and supervision in the community, then some of the costs may be reduced.

Aims of Sentencing

As we mentioned in our Working Paper on Sentencing, one of the objectives of criminal law is to protect certain fundamental values including the maximization of freedom and protection from harm. Sentencing and dispositions serve as important reflections of these values.

The Commission has also expressed the view that sentencing and dispositions should seek to restore the harm or social imbalance resulting from the offence, serve as an educative statement about the values society considers important, and in certain cases, aim at separating or isolating the offender.

The settlement or arbitration process considered in our first Working Paper on Sentencing and in the Working Paper on Diversion reveals the importance the Commission attaches to restitution and compensation and its concern for resolution of conflict as an aspect of sentencing and dispositions. This involves a consideration of the victim and his interests. Sentencing and dispositions should be aimed at repairing the harm done, re-establishing human relations and trust, and affirming fundamental values.

We believe the educative aspect of sentencing and dispositions is one part of crime prevention in general. Indeed, sentencing is a very clear expression of the disapproval of certain acts by society. By demonstrating that certain acts are unacceptable, society reaffirms the importance of certain

social norms and, thus repeatedly, reassures law-abiding citizens that their behaviour is approved.

Apart from death, imprisonment is the most drastic sentence imposed by law. It is the most costly, whether measured from the economic, social or psychological point of view. In our view the courts should not resort to imprisonment unless convinced that no other sanction can achieve the objectives contemplated by the law. In other words the use of imprisonment should be restrained by the principle of the least drastic alternative.

This principle is doubly important. First, it implies that the choice of a sanction, such as imprisonment, is justifiable only by objectives set out by law. It further implies that the state, through the crown prosecutor, must demonstrate that the suggested sanction is the least drastic means of achieving the objective. Before imprisonment is imposed, the prosecutor should demonstrate to the court's satisfaction that this extreme penalty is necessary to meet the principles and objectives of sentencing provided by law.

In this context the principles of justice, humanity and economy must be taken into account in sentencing. Justice requires that the sanction of imprisonment not be disproportionate to the offence, and humanity dictates that it must not be heavier than necessary to achieve its objective. In this sense the humanitarian sanction is the minimal or least drastic sanction. This is strengthened by the principle of economy which aims at minimizing the burden to society, the penal system, the convicted offender and his family.

Reasons for Imprisonment

Imprisonment in its modern context came into general use less than two hundred years ago and, as indicated earlier, has since been widely used and justified in a number of ways. It is often said that imprisonment is what offenders deserve. Its deterrent value has also been emphasized in the belief that an exemplary sanction would deter from crime persons tempted to commit an offence. Some also argue that a prison sentence can intimidate the person serving it, and thus put an end to his criminal conduct. Finally, there is a widespread though declining belief that prison is a good place to rehabilitate a person.

Experience and research in the social sciences now make it difficult to accept with easy assurance the usual justifications for imprisonment. Generally, it is difficult to show that prisons rehabilitate offenders or are more effective as a general deterrent than other sanctions. At the same time it is clear that imprisonment serves to separate or isolate the offender and constitutes a denunciation of the harm done. Considering this, it appears prudent to exercise restraint in imposing this criminal sanction. Imprisonment should be an exceptional sanction and should only be used for the following reasons:

- (a) to separate from the rest of society for a period of time certain offenders who represent a serious

threat to the life or personal security of others; and, or

- (b) to denounce the behaviour that is deemed highly reprehensible because of its violation of fundamental values; or
- (c) to sanction offenders who wilfully fail in carrying out obligations imposed under other types of sentences.

A. Separation

Separation or isolation is justified for persons who have committed serious crimes and who represent a serious threat to the life and personal security of others. Included in these offences would be the usual offences of violence including those committed against persons in the course of organized crime. The criteria we think ought to limit imprisonment for the purposes of separation are set out in the next section. The Commission is of the view that it is unjustifiable to use imprisonment for the purpose of isolating persons who have committed minor offences against property or the public order. Nor do we think separation or isolation can be justified because of a lack of other social resources to deal with persistent or annoying criminal conduct of a minor nature.

B. Denunciation

Some offences not representing a continuing threat to the life and security of others, may, nonetheless, constitute such an affront to fundamental values that society could not tolerate their punishment or denunciation by any sanction other than imprisonment. This may well include cases of flagrant abuse of trust or public office, or offenders convicted of murder or other serious crimes against the person but who are unlikely to react with violence against other persons.

However, we believe that, as a general rule, we should attempt to achieve the social effect sought by denunciation through the publicity of trial, conviction and pronouncement of sentence without resort to imprisonment.

Since most offences that necessitate separation of the offender are also subject to denunciation there is an overlap between these two reasons for imprisonment. These reasons express, however, different aims calling for different procedures in executing the sentence.

C. Wilful Default

Imprisonment must remain as an exceptional sanction, used only when other sanctions appear to be ineffective. In this sense the courts may have no alternative but to use it as a last resort against offenders who wilfully default in carrying out obligations imposed under other sanctions. Persons who are able to pay fines or restitution to the victim, but wilfully refuse to do so, or persons who wilfully default in carrying out their obligations under probation, for example, ought not to escape with impunity. The courts sometimes have no other choice but to impose a sanction of a short prison sentence.

On the basis of these criteria, imprisonment for cases of non-violent offences against property or the public order should rarely be used.

Who Decides the Sentence?

The sentence is a statement about values at stake in a conflict involving a victim, an offender, and the state. As indicated in Working Paper No. 3, then, it is appropriate that the sanction be imposed by an independent judicial officer. Thus, sentencing should be a function of the courts and imprisonment should be decided by a judge. Ideally, one can see not only the selection and pronouncement of sentence but the conditions of imprisonment and supervision of release procedures as matters for the courts. As a practical matter, however, the courts are not able to deal with all these concerns. In part, it is a problem of training; in part, of time or resources. For the present, then, some aspects of sentencing must be left to the correctional administration.

The division of responsibility between the courts and the administration with respect to different parts of the sentence must be related to the reasons for imposing imprisonment. Where the sentence is imposed for denunciatory reasons alone, as contemplated in the second category mentioned above, no major changes in the conditions under which the sentence is served should be made except with the consent of the court.

Where the sentence is imposed to separate the offender from the rest of society, there is also an element of denunciation. In these cases the denunciatory portion of the sentence, as indicated later, should remain within the control of the

court. In these sentences, however, the major interest is in the question of continuing risk to the personal security of others. The conditions of the sentence may then vary over a period of time in accordance with the assessment of risk. This assessment and the varying of conditions appropriate to it, should, at this time at least, be left to the correctional administration with ultimate recourse to the courts for the purposes of review only.

Because the sentence of the court ought to serve as an educative statement and be understood as a reasoned disposition, the sentence should be accompanied by written reasons. Such reasons should work for fairness in the system by keeping unnecessary disparities to a minimum and facilitating the task of the courts where appeals are taken. They should also assist the administrative authorities in making decisions affecting the sentence and thus help to avoid conflict and misunderstanding.

Guidelines for Imprisonment

It is not enough to decide who is to impose the sentence. It is important to consider what factors or criteria should affect the decision to impose imprisonment. It is also important to consider ways in which decisions affecting sentences of imprisonment can be made as rationally, consistently and fairly as possible. Previous working papers pointed out the importance of sentencing guidelines. Such guidelines would provide explicit principles and criteria to facilitate rational sentencing. When the objectives and criteria governing the use of sanctions are altered, as proposed in this paper, express guidelines become even more important. Without them, it would be more difficult to apply a sanction in accordance with new objectives, to evaluate whether these objectives are met and whether the anticipated results are obtained. In the absence of express guidelines there is also a risk that tradition and existing practices would be perpetuated and the old standards and precedents would continue to determine sentencing. With these considerations in mind, the following guidelines are suggested.

A. *Separation*

In considering imprisonment for the purpose of separating the offender from the rest of society two necessary conditions must be met:

- (1) the offender has been convicted of a serious offence that endangered the life or personal security of others; and
- (2) the probability of the offender committing another crime endangering the life or personal security of others in the immediate future shows that imprisonment is the only sanction that can adequately promote the general feeling of personal security.

In determining the probability and degree of risk among the other factors, the judge should consider:

- (1) the number and recency of previous offences that represented a threat to the life or personal security of others;
- (2) the offender's personality;
- (3) the police report on the offender's prior involvement with the criminal law;
- (4) a pre-sentence report;
- (5) all material submissions including expert opinion and research from the behavioural sciences.

In determining the probability and degree of risk the court should place considerable weight on the most reliable predictive factors now available—past conduct. But even so, predictions of future risk are likely to be inaccurate. For example, as a result of research it would appear that for every twenty persons predicted to be dangerous, only one, in fact, will commit some violent act. The problem is in knowing which one of the twenty poses the real risk. This should lead to caution in making a finding of risk, and has implications for conditions of sentence and release.

The court should rarely make a finding that a person is a probable risk to the life or personal security of others unless he has committed a previous violent offence against persons within the preceeding three years as a free citizen in the community. This is not a formula, however, to be rigidly applied. For example, it may be that for a large part of the previous three years, the offender was under strict supervision

or control. Many factors must be considered, weighed and balanced. In the end, however, the policy of the law should take note of the tendency to over-predict risk. As a consequence, there is need for decision-makers to follow clear criteria before making findings of risk.

B. *Denunciation*

Although the court may decide not to impose imprisonment in a given case for the purposes of separation or isolation it may still wish to imprison for purposes of denunciation. Before imposing imprisonment for this purpose, however, the court must be convinced that no other available sanction is sufficiently strong to denounce the offender's criminal conduct. In coming to this conclusion the court should consider:

- (1) the nature, gravity and circumstances of the offence;
and
- (2) the social reprobation in which the offence is held.

C. *Non-compliance*

The third purpose for which imprisonment may be used relates to cases of last resort where the offender's wilful refusal to pay a fine, make restitution or comply with other non-custodial sanctions demonstrates to the satisfaction of the court that a short term of imprisonment is the last resort.

Length of Prison Terms

A. *Upper Limits*

Drawing up a detailed scale of prison terms to apply across a range of criminal offences is difficult unless accompanied by studies covering a re-definition and re-classification of offences covered by the Criminal Code. While further work in this respect remains to be done, we would like to present a general framework regulating maximum prison terms.

One of the most striking aspects of prison terms under the present Code is the very wide discretion given judges in selecting a term. Various offences under the Criminal Code are punishable by life imprisonment, fourteen years, ten years, five years, two years or six months imprisonment. Breaking and entering a dwelling house, for example, is punishable by any term up to life imprisonment. So is rape. Theft over \$200.00 is punishable by up to ten years and theft under \$200.00 by up to two years. Common assault prosecuted as a summary conviction offence can be punished by six months imprisonment while manslaughter carries a sentence of life imprisonment.

These high maximum sentences place an unreasonable burden on judges in requiring them to exercise an unnecessarily wide discretion. In fact these maximum terms appear to be disproportionately high, even anachronistic, when

compared with the range of actual sentences pronounced by the courts. About one to four percent of admissions to penitentiaries in a given year carry terms in excess of fifteen years. It is unusual for a sentence for breaking and entering to exceed three years. The average prison sentence for this offence over the years has varied from fourteen to sixteen months, yet it is punishable by life or fourteen years depending upon whether the premises broken into was a dwelling house or a place of business.

Over the years the very wide discretion given judges in selecting prison sentences appears to have settled around an established average, but wide deviations in particular cases raise a risk of unequal treatment and are a source of unrest in prisons. Moreover, in principle discretion should be no greater than necessary and be subject to reasonable guidelines. The Commission is of the view that the maximum prison terms presently provided by law could be reduced without unduly limiting the discretionary power of the court.

What should be the upper limits in sentences of imprisonment? First of all, the sentence should not deny the offender the possibility of eventual discharge—no sentence of imprisonment should deny hope to the offender. We recommend, therefore, the abolition of life sentences of imprisonment. The circumstances of an offence may lead us to ask why give hope to the offender when he gave no consideration to the victim. The reply must surely be why take our measure of response from the criminal?

Secondly, the upper limits of terms of imprisonment should be related to the purpose of the imprisonment. Prison sentences imposed primarily to separate from society offenders whose conduct represents a serious risk to the life and personal security of others should carry a higher maximum than those aimed at denunciation, and prison terms imposed for wilful default of other sanctions should be of short duration.

Separation or isolation of the offender convicted of crimes of serious violence to persons may justify quite a high maximum. These should vary with the offence and its circumstances, but the Commission is of the view that a sentence of up to twenty years should provide adequate security. At the end of that time there can be recourse to mental health legislation if the offender is mentally ill and a danger to others. Such a procedure should be subject to the same conditions and safeguards as those for civil commitment. Experience shows that most offenders who are believed to be a danger to others appear to be less of a risk with increasing age. Moreover, the difficulty of predicting with accuracy who may or may not pose a risk is so great that the law should proceed with caution. Considering that nearly all prisoners today are detained for less than fifteen years, that prolonged imprisonment makes the eventual successful return of the offender to society more and more difficult, and that very long periods of parole supervision appear to be unnecessary and burdensome, an upper limit of twenty years in the interests of promoting the general security would seem to be adequate. One also has to keep in mind that the function of the prison system itself is endangered by conditions of hopelessness. Beyond a certain point the price to society in economic as well as human terms outweighs the gains.

In some cases, denunciation will be the primary purpose of the sentence of imprisonment, as in cases of flagrant breach of trust, or of serious violent offences against the person where the offender's conduct does not represent a continuing risk to the life and personal security of others. In these cases a maximum term of three years may be adequate. This would apply equally to the denunciatory part of a longer sentence given for the purpose of separation.

When imprisonment is used to deal with offenders who are wilfully in default of obligations imposed under other sentences such as fines, the imprisonment should not, in general, exceed six months.

B. *Minimum Terms*

Should there be minimum or mandatory terms of imprisonment? Such terms are rare under the existing law, but upon conviction of importing drugs under the present provisions of the Narcotic Control Act, for example, the court must impose a prison term of not less than seven years. A second conviction for impaired driving carries a minimum term of two weeks imprisonment.

While there are no available objective measurements on the effectiveness of such sanctions, experience does not show that they have any obvious special deterrent or educative effect. Generally, the reported research does not show that harsh sanctions are more effective than less severe sanctions in preventing crime. Other problems arise in denying judges discretion to select the appropriate sanction or the length of a prison term in individual cases. For one thing circumstances vary so greatly from case to case that an arbitrary minimum may be seen as excessive denunciation or an excessively long period of separation in the light of the risk and all the circumstances. Indeed, not every case falling within a given offence will require imprisonment for the purposes of isolation. Similar criticisms could be made of a sentencing provision that denies judges the power to choose between a custodial and a non-custodial sentence.

The phrase "minimum term" is sometimes used in a second sense. In the context of release procedures, it can refer to that part of the prison sentence that must be served behind walls before release on various conditions in the community. Reference has already been made to this question in the context of imprisonment imposed for reasons of denunciation. Apart from this it is difficult to see why there should be a minimum time to be served in complete custody. The emphasis should be less on prison and more on the process of serving a time period under varying conditions of custody and limited access to the community. The question of release procedure is discussed more fully later in this paper.

C. Consecutive Terms

What provision should be made in a sentencing structure for consecutive sentences in the case of persons who are sentenced simultaneously on several different convictions? If an offender is currently serving a prison term while convicted of a second offence, should the second term be consecutive to the first or concurrent to it so that the offender serves both at the same time? At present, the court exercises discretionary powers in this respect and can ordinarily determine whether the offender will serve his prison sentences concurrently or consecutively.

If the law makes provision for consecutive sentences, there is a risk of extremely long sentences cumulating in individual cases. Unless some limits are imposed, such sentences may not meet the objectives of separation or denunciation as already described. In addition long consecutive terms would run counter to the principles of justice, humanity and economy. On the other hand, the complete abolition of consecutive sentences might be interpreted as allowing certain serious criminal acts to go unpunished and might even encourage some offenders to take further risks. In exceptional cases, the sentence might even be considered as unfair and too short in comparison with other sentences imposed on others.

We believe therefore that the courts should retain the power to sanction several offences by a common sentence that can be longer than that for a single offence. However, such power should not apply to offences arising out of the same criminal enterprise, but to wholly separate conduct. Finally, the sentence in such cases should always respect the general objectives of imprisonment and take into consideration the criteria for the imposition of a common sentence formulated in the sentencing guide.

In general, we believe the maximum term for each category of offence will be sufficient to reach the objectives the court has in mind and when it is necessary to exceed such maximum terms by imposing consecutive sentences, the court

should justify its decision in terms of the doctrine of the least drastic alternative. However, no common sentence should be in excess of double the maximum permitted for the most serious offence and in any event no more than twenty years.

Exceptional Cases

The general public is sometimes shocked, and with good reason, by acts of violence committed by some offenders. These offences, though few in number, undermine the general security and give rise to the impression that our society is prone to violence. Such events, which are generally unforeseeable, understandably give rise to public criticism and demands that Parliament amend the law in order to give greater protection to citizens.

A. *Habitual Offenders*

The first group of offenders to be the subject of special sentencing provisions and indeterminate life sentences were those found to be habitual offenders. The motivation behind this type of legislation was the desire to lock up the dangerous hardened criminal for long periods of time. Canadian legislation enacted in 1947 was modelled on an English statute of 1908 which was later repealed as ineffective. This type of legislation has been strongly criticized by various writers and committees, including the Canadian Committee on Corrections (The Ouimet Committee).

In their report on corrections in Canada, the Ouimet Committee pointed out that the habitual offender law was applied unevenly across Canada, and that it tended to reach

petty offenders against property rather than dangerous or professional criminals. In addition, this law has failed to create special opportunities to reform or rehabilitate the offender.

The Commission is of the view that the habitual offender legislation has not been effective and recommends its abolition. Persons already sentenced under those provisions should have their cases reviewed immediately by a judge with a view to their possible release under supervision or control and termination of their sentence after a given period of successful living in the community.

B. *Professional Criminals*

Apart from the habitual offender legislation, Canada has not had any law specifically aimed at professional criminals. In the United States there continues to be a high interest in special sentencing provisions of up to twenty years as a means of striking at such criminals and organized crime.

While one may sympathize with this desire to legislate prison terms for professional criminals, it raises many difficulties. Is the problem one of not having long sentences available or of not being able to get convictions? How does one define "professional criminal" with precision? Again, our law is based on the assumption that a man should be sentenced for the harm he has done, not for what he is. Yet "professional criminal" and "organized crime" refer to a way of life, to a status or condition, and not to criminal acts. Must the Crown prove such a way of life beyond a reasonable doubt?

The most recent attempt at definition is provided by the National Advisory Commission on Criminal Justice Standards and Goals, Report on Corrections as follows:

... [A] professional criminal [is] a person over 21 years of age, who stands convicted of a felony that was committed as part of a continuing illegal business in which he acted in concert with other persons and occupied a position of management, or was an executor of violence.

An offender should not be found to be a professional criminal unless the circumstances of the offence for which he stands convicted show that he has knowingly devoted himself to criminal activity as a major source of his livelihood or unless it appears that he has substantial income or resources that do not appear to be from a source other than criminal activity.

In our opinion the criteria in this definition are too vague. "Illegal business", "acting in concert" and "position of management" are elastic terms. While the definition does appear to be directed toward crime's upper management, the experience with laws relating to drug traffic and habitual offenders show how often such legislation is applied to petty offenders or underlings while seemingly "respectable" leaders in the illegal business avoid detection. Most of the persons aimed at by this kind of legislation escape, for hard evidence is difficult to obtain and convictions are infrequent. Special sentencing provisions then become more symbolic than real.

As we have recommended earlier in the paper, however, evidence of conduct in the community as contained in police and pre-sentence reports should be available to the court for the purpose of determining the length of sentence. It will also be available to subsequent authorities for determining the nature of control necessary. Having regard to the general failure of special forms of legislation we recommend that exceptional cases be dealt with under the general sentence structure.

C. Dangerous Sexual Offenders

Another attempt to deal with exceptional cases was the enactment in 1948 of special laws for the detention of persons found to be dangerous sexual offenders. Experience with this type of law in Canada and elsewhere, however, has been one of general failure. Growing experience and research shows the difficulty of making reliable findings about dangerousness. Faced with this unreliability the indeterminate life sentence

now provided for this class of offender is open to criticism. Progress in developing treatment has been disappointing as well. In addition, the law appears to be unevenly applied across the country and has been criticized for its lack of fairness and sufficient safeguards by the Canadian Committee on Corrections and others.

As already mentioned, it is difficult to describe with accuracy the class of persons that should be designated as dangerous sexual offenders. Vague and imprecise laws spread their net too widely. As a result persons are brought within their provisions who probably should not be. Another vital criticism is that we now realize how very badly we make judgements about dangerousness. Not even psychiatrists are of real help here. We do not know how to predict dangerousness or degrees of dangerousness with accuracy.

The problem is compounded by the difficulty of predicting how a man will behave on the street by assessing his performance behind bars. It cannot be done at all effectively. The best way of assessing risk is to make observations under conditions of controlled release. This is consistent with the finding that the best predictor of future behaviour is past behaviour. Nor can the special sentencing laws for dangerous sexual offenders be depended upon any longer, as they were at one time, on the ground that long-term medical treatment would reduce or eliminate dangerousness. It is an illusion. We know very little about changing human nature even under the best of conditions.

Serious offences, including sexual offences, should be dealt with under the ordinary sentencing law. If the offence warrants a sentence of imprisonment for purposes of separation, this offers the possibility of a long period of custody and release under controlled supervision where needed. Experience seems to show that with maturity and age offenders are less likely to commit further crimes of violence. In view of the limits of rehabilitation, the costs of over-prediction, and the general principles enunciated earlier, a possible sentence of up to twenty years in cases of serious violence against persons

should be adequate to deal with offenders who are thought to be a continuing risk to the personal security of others.

It should not be forgotten that a prisoner can also be prosecuted and convicted for offences committed during his imprisonment. Prisoners who commit offences while under sentence could be sentenced for these additional offences within the limits described earlier under consecutive sentences. In addition, some prisoners who present a serious threat to the personal security of others may suffer from a mental illness justifying their hospitalization during or after their sentence.

The existing law relating to dangerous sexual offenders should be abolished. Further, a judge should be appointed to inquire into the cases of the men already found to be dangerous sexual offenders with a view to establishing a release program, a periodic review of their cases and termination of their life sentences after a given period of successful living in the community.

Conditions of Sentence and Release Procedures

A. *Jurisdiction*

We have just indicated the reasons justifying the use of imprisonment and the objectives and criteria to be used as guides by courts in imposing prison sentences. We also proposed a sentencing guide and simpler types of prison sentences to ensure that this severe sanction is used with restraint and in a clear and just manner. A consideration of these matters revealed the importance of two further issues: the control and the content of conditions of imprisonment and release.

Conditions of sentence and programs for the release of offenders should reflect the purposes of the sentence. Where imprisonment is for purpose of denunciation only, the ultimate control of the sentence, as indicated earlier, should be with the court. This is subject to the recommendation that in such sentences the final third should be fixed by Parliament as a portion to be served in the community in order to facilitate the offender's re-entry into the community. During the first two-thirds, however, any significant change in the conditions of the sentence should be subject to review by the court. This would not prevent the prison administration from making day-to-day decisions in the ordinary way, but should those decisions be seen as seriously modifying the denunciatory aspects of the sentence, the court would have a power of review. During the final third of a sentence imposed for purposes of denunciation, the offender would be released to the

community with such help or assistance as might be needed. The offender would not be returned to the institution unless he was subsequently convicted.

If a sentence is imposed both for purposes of denunciation and separation, two-thirds of the denunciatory portion would be under the ultimate control of the courts as outlined above. The remainder of the sentence would follow the procedures outlined for sentences of separation.

Jurisdiction over a sentence or a portion of a sentence imposed for purposes of separation should be with the correctional authorities as described below. Since this type of sentence involves an assessment over time under varying conditions it can best be supervised by the correctional authorities. As indicated earlier, ideally, control in this type of sentence should also rest with the courts, but at the present time this is not practical.

B. *Conditions*

Imprisonment may sometimes be necessary even though harsher sanctions cannot be shown to be more effective than those that are less severe. Despite the negative influences of imprisonment and its generally damaging effects on individuals, prisons may still be necessary to isolate, to denounce and to make sure the law can cope with wilful default.

Yet the assumption is that the offender, as a general rule, will return to the community. This necessarily affects the conditions of the sentence. Imprisonment is a sanction involving a greater or lesser deprivation and restriction of access to the community, its resources and human relationships. The extent of this deprivation will vary depending on whether the purpose of the sentence is the separation from society of those who have endangered others, or simply denunciation of reprehensible conduct, or sanction for wilful default under other sanctions.

Where imprisonment is imposed to separate those who have endangered others from the rest of society, different restrictions on freedom of movement are necessary than in the case of pure denunciation. In the interests of security, reasonable limitations may need to be placed on visiting, correspondence, purchase or movement within or outside prison walls. In general, the object of facilitating the offender's successful return to the community will be enhanced by permitting living conditions in prison to approximate those in the community.

This is important in three respects. First, it assumes that the prisoner is expected to discharge the normal duties and responsibilities of all citizens; such as, for example, to work in order to help support himself and his family; to pay out of wages any dues covering hospital insurance or unemployment insurance and pension schemes; to pay restitution to a victim who may have been injured; to further educate himself in a manner and at a pace as similar as possible to that of other citizens; to contribute to the decision-making and upkeep of the institution to the extent that it is possible and practical under the circumstances; to maintain contact with his family and to make reasonable plans for his return to the community; and to discharge with responsibility his obligations on his return by stages to the community.

Second, it follows from these duties that the offender should have many of the opportunities for work, pay, education and access to health or other community resources that are available to other citizens. Moreover, his participation in recreational activities, socio-cultural programs or strictly therapeutic programs should be voluntary to the same extent as in a non-imprisonment environment. Participation in these matters should not interfere with the discharge of an offender's responsibilities and duties as a citizen. One should not forget that there are disadvantaged members among free citizens who are also expected to meet their social obligations.

The third object of letting living conditions while imprisoned approach as much as possible living conditions outside of imprisonment enables better decision-making about the prisoner. Since consideration of an individual's behaviour

is a valuable indicator of the risk he may pose to the security of others, the closer conditions of imprisonment approximate those in the community, the more likely will an accurate assessment of risk be made. Such conditions also provide an opportunity for the offender to demonstrate to what extent he is able or willing to assume his responsibilities as a citizen.

C. Release Procedures

Many offenders, particularly those imprisoned in order to separate them from the rest of society, have problems of adapting to society. We are convinced that more effective assistance can be given them in facing their problems under conditions of controlled liberty than under total confinement. As someone once said, it is difficult to train an airplane pilot in a submarine! The doctrine of the least drastic alternative as well as public protection requires that imprisonment include a controlled release program.

Where the sentence of imprisonment is imposed in order to separate the offender from the rest of society we recommend a graduated release from complete custody through various stages to ultimate release. The prescribed staging should be developed through the Sentence Supervision Board, described later, and progress from one stage to another should depend on the offender's behaviour during the previous stage. With this category of offenders, decisions to release would include an attempt to identify offenders less likely to commit offences endangering the life and security of others and those more likely to do so.

The progress from one stage of release to the next of offenders less likely to commit further acts endangering the personal security of others should present few problems; any given stage might even be by-passed on recommendation of the releasing authority. In dealing with the group more likely to commit such offences, however, the releasing authorities, applying definite criteria, could deny transition to a subsequent stage and could even authorize a prisoner's return to a

previous stage. However, as a rule, progress should be normal with automatic admittance to the next stage of conditional freedom unless by his conduct the offender indicates he is not yet ready for that stage.

The transition from total custody to stages of decreasing restriction of freedom should begin with supervised temporary absences at the appropriate time. With rare exceptions prisoners should be given absences to allow them to maintain, renew and build family and community relationships. In addition, such leaves would also test the offender's ability to act with responsibility in the community. Temporary absences should be denied only in special cases where the correctional administration shows to the satisfaction of the releasing authority that such an absence would present a threat to the life and security of others.

A successful first temporary absence would entitle the prisoner to other periodic absences. These leaves should be progressively longer and granted at increasingly frequent intervals. When an offender has successfully completed his program of temporary absences over a period of time proportionate to the length of his sentence, he would enter the next stage, which we refer to as day release. He would then be able to attend school, work or seek employment in the community during the day but return to the institution, a community residential centre or a specific residence subject to conditions of personal restraint. The final stage would consist of release in the community under reduced direction, support and supervision. As indicated earlier, as a general rule, all offenders would have to serve the last one-third of their sentence in the community.

In general, the transition from one stage to another should depend on the absence of criminal conduct and the observance of the conditions of that stage; the decision should not be based on a prediction of risk in the abstract but on conduct. It is important to remember that rehabilitation cannot be used as a primary reason for imposing imprisonment in the first place. Therefore, it is logical that the timing of

release and the transition from complete custody to lesser degrees of restricted freedom should ordinarily not be dependent on the offender's reaction to treatment but on his behaviour and acceptance of responsibilities. In particular, transition from one stage to another should not be denied simply because the offender did not wish to participate in the voluntary institutional program relating to sports, cultural activities or rehabilitation. Denial of entry to the next stage would, however, be justified if the offender failed to live up to his responsibilities by refusing to work or undertake an educational or training program. As indicated earlier, return to a previous stage would be justified where a prisoner committed a crime or failed to comply with the conditions of his release. In the interests of justice, these conditions should be specific and objective, and in the interests of fairness related to the offender's capacities. These conditions should be worked out in conjunction with the offender and clearly understood by him.

A graduated program of release through various stages, however, would not be necessary when imprisonment is imposed solely for purposes of denunciation. In such cases, conditions of imprisonment and release procedures are not affected by the need to re-socialize the offender or to develop and test his capacity to act responsibly in a graduated release program. In cases of simple denunciation, and this includes the denunciatory portion of a mixed sentence, the primary concern is that release procedures should not be such as to undermine the seriousness of the sentence and ultimate control over the sentence remains with the court. At the same time the negative and damaging effects that usually accompany imprisonment should be offset so far as possible by the temporary absence program and by release under supervision for the last one-third of the sentence. These are not simply humanitarian gestures. They benefit society, the offender and his family in that the offender maintains links with his home and gets help in meeting tensions and problems arising during the transition period from an institution back to the community. For humanitarian reasons, upon applica-

tion by the offender, release before the two-thirds release date may be justifiable under certain conditions. Such early releases should be exceptional and subject to the approval of the court.

Imprisonment may sometimes be imposed in cases of wilful refusal to comply with conditions imposed under other penal sanctions. It is difficult to deal with the stubborn citizen who refuses to co-operate. The law's requirements should be met, but in so far as possible the conditions of imprisonment should leave the door open for re-socialization and early discharge if the offender discharges his obligations.

As indicated above, the purpose of the sentence, the custodial level and hence the degree of personal restraint should be in accord. These purposes will shape the conditions of imprisonment including the degree of security. Following the principle of restraint, prison institutions and conditions of imprisonment should avoid unnecessary restrictions whenever possible. Conditions of maximum security should be seen as a retrogressive stage to which the offender could be committed when his conduct shows that he is a high escape risk or poses a serious risk to the life and security of others thus making such conditions necessary. The decision to place an offender in severe security conditions should be ratified by the Sentencing Supervision Board, referred to later in this paper, and continued detention under oppressive security should be permissible only when the Board so decides. Moreover, the Board should be obliged to review such cases at periodic intervals and be satisfied that continued detention under special security is absolutely necessary.

Studies have shown that the offender's conduct during the post-release period is one of the best indications of whether he is likely to commit further offences. An individual who has not returned to crime in the two years following his return to the community, will very likely not recidivate. Thus, in order to lighten the burden on the supervision service and correctional budgets, and in order not to subject the offender to unnecessary pressure or restraint, we recommend that all

prisoners on release in the community should no longer be subject to conditions and supervision after two successful years, unless the correctional administrators are able to show that supervision and assistance are still required. A reduction of conditions of supervision would not terminate the sentence; the offender would still be liable to imprisonment to complete his sentence if he were found guilty of a criminal act before he had served his entire sentence.

Finally, supervised release in the community should not be too long. Several committees and commissions have already recommended that sentences of imprisonment should be terminated in cases where the prisoners have served a given portion of their sentence in the community without committing new offences. There is merit in the suggestion that upon application to the court in such cases the judge should have the power to terminate the sentence.

The Sentence Supervision Board

Clarity and uniformity of approach in sentencing should be encouraged by clear and precise sentencing guidelines and express criteria for decision-making. Sentencing may also be improved by paying further attention to decisions affecting the carrying out of the sentence. Indeed, the Commission is of the opinion that from the point of view of the public, the prisoner and correctional officials, there is much to be said for making some types of correctional decisions openly and in a way that is reasonably simple and fair. While there can be no doubt that many types of decisions currently made by prison officials and parole authorities should remain discretionary, other types of decisions affecting the sentence should be made initially by an impartial body or be subject to review by an impartial body.

The Commission's position on the extent and scope of such powers of review awaits the completion of studies now underway on decision-making by parole authorities and prison officials. Suffice it to say that the Commission's tentative position reflects a general concern for openness, visibility and fairness in the way decisions are made. The courts, the legislatures and administrative officials themselves, sometimes under criticism from various sources, are already moving in this direction.

In our view, it would be helpful to have a board independent of the correctional and prison administrations charged with the responsibility for making or reviewing key

decisions affecting conditions of imprisonment and release procedures. This board would not hear any appeals against sentence, for that is a judicial matter for the courts. Rather it should be concerned with seeing that the sentence is carried out fairly and according to law. In this respect such a Sentence Supervision Board should have powers to make decisions, to review, and generally, to supervise conditions of imprisonment and release procedures. In our opinion, such a board would be something like the existing Parole Board, but its jurisdiction would be somewhat different. Its decisions should be subject to the general control and supervision of the superior courts. We see no reason why the Board should not adopt reasonable and adequate rules of procedure to meet the requirements of the courts and the demands of sentencing.

The Board could be composed of persons such as members of the Parole Board. Members should have a variety of backgrounds and experiences. A number should have a good knowledge of the correctional field and at least some members should have legal training or experience in formal decision-making. The independence of the Board is important, and this could be secured in several ways. Among these we include appointment for a reasonable term at the pleasure of the Governor-General with reasonable remuneration. We recommend that this Board be set up so as to permit it to make decisions on a regional basis.

The Sentence Supervision Board, as already indicated, should have power of original decision-making in some matters, and powers of review in others. However, the prison administration should be free to make the initial decision in many of the matters listed below, with review being either automatic or optional depending on the gravity of the deprivation.

Ultimate control over conditions of sentences and release procedures as indicated would be with the courts or the Sentence Supervision Board depending upon the type of sentence. In sentences carrying elements of both denunciation and separation this divided jurisdiction may give rise to prac-

tical problems. Hence it is suggested that in all cases changes in the conditions of sentence or release rest initially with the prison authorities, with review by the Sentencing Supervision Board. In cases of denunciation, however, the decision of the Board would be subject to review by the court. The same, of course, applies to the denunciation portion of a mixed sentence of denunciation and separation. With experience, the Board, the courts and prison officials should produce policies and criteria to assist in the disposition of future cases. Through the Board uniformity and consistency in decision-making should be encouraged.

The matters that should be subject to review by the Board or the court in appropriate cases may include power:

1. to refuse a first temporary absence at the prescribed time or any other temporary absence provided by regulations;
2. to refuse to permit a prisoner to begin the next stage at the prescribed time;
3. to grant additional temporary absences to prisoners who request them or to shorten or disregard a stage, in compliance with the criteria stated in the regulations;
4. to impose special conditions of personal restraint at any stage where the offender does not accept them voluntarily;
5. to revert prisoners to a former stage through revocation of day release, community supervision, or through transfer to maximum security conditions;
6. to serve as a disciplinary court for serious violations of regulations, or for offences which entail severe punishment such as solitary confinement for a period exceeding one week, or fines or compensation involving large sums of money. In the case of serious offences, the prisoner should be prosecuted in court.

As indicated above, the prison administrators would continue to make most of the decisions affecting the daily routine

of imprisonment but the Board, subject to review by the court in cases as already indicated, should have the power to review more important decisions when the prescribed procedure has not been followed or when the criteria specified in the regulations have not been applied. We wish to emphasize that, in our opinion, the Board should intervene only in the more serious cases. It would be desirable to have some types of problems or disputes settled inside the institution by conciliation or other procedures which are less formal but nevertheless fair. Among the matters that should be reviewable by the Board and ultimately by the court are the following:

1. disciplinary sanctions;
2. all cases of offenders detained for six months under special security conditions;
3. deprivation of medical, psychological, psychiatric or other services normally available to citizens.

In recent years much attention has been paid to fair procedure and the rules that should govern the operations of various boards and tribunals. When, for example, should a hearing be held? How much time should a person have to prepare for such a hearing? What rights should offenders have to see their file or to know what is in it? How much information is required for effective participation in a hearing? What additional assistance is needed? Should a record be kept of what goes on at the hearing? Should all decisions be justified in writing?

As already indicated, the Commission has on-going studies in this area. When completed they should be of help in determining the procedures that would best meet the demands of justice and permit bodies such as the Sentence Supervision Board to operate efficiently and fairly. Later reports will describe our findings.

Conclusion

This, then, completes the outline of principles which, in our view, ought to govern the use of imprisonment. For various reasons imprisonment will remain a practical necessity in dealing with some offenders, particularly those who engage in violence against the person. We should, however, use imprisonment selectively and with restraint. Extensive resort to this sanction may only increase costs and risks to society rather than reduce them. We suggest in particular that imprisonment be imposed only for specific purposes. We further suggest that the sentence of imprisonment should be of limited duration and by its very nature be understood to involve varying conditions of custody or supervision inside and outside prison institutions. It is important in our view that the conditions affecting the carrying out of the sentence be consistent with the purpose of the sentence imposed. Major decisions affecting the carrying out of the sentence should be made openly and according to recognized rules of fair procedure.

These principles should provide the framework for the development of administrative policies, rules and practices. The Commission recognizes that much work remains to be done in this respect.

The proposals in this paper, for example, leave no scope for remission laws as presently conceived and will mean changes and simplification in other release procedures. Also, very little has been said about ways of dealing with problems

arising inside the prison such as those handled at the present time by Warden's Courts, Ombudsmen or Correctional Investigators. Their function has to be based on regulations that acknowledge the special conditions and problems arising in prison. Procedures and regulations have to be decided on the basis of legal principles that assure fairness and enable the community to become more familiar with the actual workings of the prison and release system.

These suggestions for safeguards in carrying out sentences of imprisonment bring to an end our recommendations on prison sentences. On the basis of our proposals and the work still to be done, we are hopeful that the correctional system will be more just, more humane and in better harmony with the principles of criminal justice and the needs of society.

In Canada today, on any one day, roughly one in every 1,000 residents is serving time in a penal institution—a total of 20,000 imprisoned adult offenders.

The reasons they are there, and whether they should or should not be there, are explored in the four studies of this book.

